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In The

Supreme Court of the United States

October Term, 1994

HAWAIIAN HOMES COMMISSION; KALI WATSON, *in his capacity as Chairman of the Hawaiian Homes Commission;* WANDA MAE AGPALSA, ANDREW APANA, NANI BRANDT, ROCKNE FREITAS, DENNIS KAUAHI, LLEWELYN KUMALAE, ANN NATHANIEL, PATRICIA SHEEHAN, *in their capacities as members of the Hawaiian Homes Commission; and* THE DEPARTMENT OF HAWAIIAN HOME LANDS OF THE STATE OF HAWAII,

Petitioners,

vs.

THE AGED HAWAIIANS, *an unincorporated association,*

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Hawaiian Homes Commission Act, 42 Stat. 108 (July 9, 1921), as amended, and whose administration was transferred to the State of Hawaii by the Hawaii Admission Act, 73 Stat. 4 (Mar. 18, 1959), creates a homesteading program for the benefit of those individuals of at least one half indigenous-Hawaiian ancestry, as well as certain of their descendants. The homesteading program created by the Act is the oldest and largest program in the United States exclusively benefiting native Americans in the State of Hawaii. The questions presented are:

1. Whether the Hawaiian Homes Commission Act grants native Hawaiian beneficiaries of that Act a right "to be placed on the land to the fullest extent possible," and, if so, whether that right is properly classified as "property" for purposes of the Due Process Clause of the Fourteenth Amendment?

2. Whether, given the close connection between the "property interest" issue in this case and the "liberty interest" issue presented in *Sandin v. Conner*, No. 93-1911 (U.S. argued Feb. 28, 1995), this Court should hold this petition pending the decision in *Sandin*, and, if appropriate, vacate and remand?

3. Whether, if native Hawaiian beneficiaries possess a "property interest" in being "placed on the land to the fullest extent possible," Due Process requires trial-type proceedings before the Commission makes quasi-legislative determinations, which affect tens of thousands of beneficiaries, concerning the size of Homestead lots the Commission will permit to be leased?

PARTIES TO THE PROCEEDING

This action was initially instituted against Ilima Pi'ianaia, the then-Chairman of the Hawaiian Homes Commission, and Commissioners Andrew Apana, Nani Brandt, Edison Keomaka, Alvina Park, George Robertson, and Walter Smith, as well as the Hawaiian Homes Commission and the Department of Hawaiian Homes Lands of the State of Hawaii. During the course of the litigation, Hoaliku Drake succeeded Ms. Pi'ianaia as Chairman of the Commission, and, upon the election of Governor Benjamin J. Cayetano, in November, 1994, Mr. Kali Watson was appointed to succeed Mrs. Drake. Petitioners Agpalsa, Freitas, Kauahi, Kumalae, Nathaniel, and Sheehan have also been substituted in their official capacities for their predecessors in interest. *See generally Kentucky v. Graham,* 473 U.S. 159 (1985).

The Aged Hawaiians is an unincorporated association that includes native Hawaiian benficiaries of the Hawaiian Homes Commission Act. The Aged Hawaiians have been named in the plural in the caption to follow the manner in which they were denominated by the state court. The association will therefore be referred to herein as "Respondents." *See* Pet. App. 1a.

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On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

PETITION FOR WRIT OF CERTIORARI

Petitioners Hawaiian Homes Commission, *et al.*, pray that this Court issue a writ of certiorari to review the opinion and final judgment of the Supreme Court of the State of Hawaii issued in this proceeding on March 14, 1995.

OPINIONS BELOW

The opinion of the Supreme Court of Hawaii is reported at 78 Haw. 192, 891 P.2d 279 (1995), and is reprinted in Appendix ("App.") "A" to this Petition. The "Notice and Judgment on Appeal," which serves the function of the mandate under state law, is unreported and is reprinted in App. "B." The orders of the Circuit Court for the Third Circuit of the State of Hawaii, dated August 25, 1992, September 1, 1992, and October 8, 1992, leading directly to the appeal in the Supreme Court of Hawaii, together with the Circuit Court's order granting certification pursuant to Rule 54(b), Haw. R. Civ. P., dated March 2, 1993, are unreported and are reprinted in Apps. "C"-"F," respectively.

Other orders issued by the Circuit Court in the action below, on October 4, 1989 (two orders), January 30, 1990, February 6, 1990, and September 4, 1990, are also unreported, and are reprinted in Apps. "G"-"K," respectively.

JURISDICTION

The Supreme Court of Hawaii issued its opinion on March 14, 1995, *see* App. "A," and rehearing was not sought by any party. The time in which this Petition must be filed therefore extends to and includes June 12, 1995. This Petition is timely.

The Supreme Court of Hawaii conclusively resolved the Respondents' claim that Petitioners had "subjected or caused to be subjected" the Respondents to a denial of procedural Due Process, in violation of the Fourteenth

Amendment to the United States Constitution, and 42 U.S.C. § 1983. *See* App. 49a. The only claims on review in the Supreme Court of Hawaii were claims brought pursuant to § 1983, *see id.*, and the Supreme Court of Hawaii took up and addressed Respondents' Due Process claim as a matter of federal constitutional law. The state court opinion leaves nothing further to be done with respect to Respondents' Due Process claim. According to the Supreme Court of Hawaii, "the Aged Hawaiians are entitled as a matter of law to summary judgment on their claim that the Commission violated their due process rights when it failed to adequately consider their members' acknowledged desire for land sufficient to engage in commercial ranching." App. 49a. The state court's judgment with respect to the Due Process claim in this case is final in all respects. Jurisdiction is thus invoked under 28 U.S.C. § 1257(a) to review the state court's disposition of the Due Process claim.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution provides in pertinent part that

> No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]

Pertinent portions of the Hawaiian Homes Commission Act of 1920, 42 Stat. 108 (July 9, 1921), as amended ("HHCA"), *reprinted in* 1 Haw. Rev. Stat. 167 *et seq.*, and the Hawaii Admission Act, 73 Stat. 4 (Mar. 18, 1959), are

reprinted in Apps. "L" and "M," *infra*. The most pertinent portions of the HHCA related to this Petition are §§ 204(2) and 207(a) and (b), which state in part:

> In the management of any retained available lands not required for leasing under section 207(a), the department [of Hawaiian Home Lands] may dispose of those lands to the public, including native Hawaiians, on the same terms, conditions, restrictions, and uses applicable to the disposition of public lands in chapter 171, Hawaii Revised Statutes [the general public land law of Hawaii]; provided that the department may not sell or dispose of such lands in fee simple except as authorized under section 205 of this Act; provided further that the department is expressly authorized to negotiate, prior to negotiations with the general public, the disposition of a lease of Hawaiian home lands to a native Hawaiian, or organization or association owned or controlled by native Hawaiians, for commercial, industrial, or other business purposes, in accordance with the procedure set forth in section 171-59, Hawaii Revised Statutes, subject to the notice requirement of section 171-16(c), Hawaii Revised Statutes, and the lease rental limitation imposed by section 171-17(b), Hawaii Revised Statutes [HHCA, § 204(2)].
>
> * * *
>
> The department [of Hawaiian Home Lands] is authorized to lease to native Hawaiians the right to the use and occupancy of a tract or tracts of Hawaiian home lands within the following acreage limits per each lessee: (1) not more than forty acres of agriculture lands or lands used for aquaculture purposes; or (2) not

> more than one hundred acres of irrigated pastoral lands and not more than one thousand acres of other pastoral lands; or (3) not more than one acre of any class of land to be used as a residence lot [HHCA, § 207(a)].
>
> * * *
>
> The title to lands so leased shall remain in the [State]. Applications for tracts shall be made to and granted by the department, under such regulations, not in conflict with any provisions of this title, as the department may prescribe. The department shall, whenever tracts are available, enter into such a lease with any applicant who, in the opinion of the department, is qualified to perform the conditions of such lease [HHCA, § 207(b)].

Also relevant to this case are portions of the Hawaii Administrative Procedure Act, Chapter 91, Haw. Rev. Stat. (1985 & Supp. 1992) ("HAPA"). These provisions are printed in App. "N."

STATEMENT OF THE CASE

This case arises out of the State of Hawaii's management of the oldest and largest public benefit program established for the benefit of the indigenous people of the Fiftieth State. Unlike native Americans on the mainland, native Hawaiians are not recognized as tribes and do not have formal treaty relations with the United States. Rather, in 1921, Congress, through its power to legislate for the benefit of native Americans, established the

Hawaiian Homes Commission Act, a homesteading program for native Hawaiians. When Hawaii became a State in 1959, administration of this homesteading program was transferred to the Fiftieth State.

From its inception, the homesteading program has been plagued by a lack of capital and a shortage of desirable land. Because most of the Home Lands are located in the poorest and most remote areas in the Islands – many miles from the nearest roads, sewers, or running water – the cost of preparing the land for homesteading was, and has remained, enormous. Congress, in its wisdom, has never provided funding for the infrastructure necessary to make the land habitable and productive. Instead, Congress left it to the Act's administrators to raise capital from the corpus of "available lands" granted to the program in 1921. Since their creation, the Department of Hawaiian Home Lands, and its overseeing board, the Hawaiian Homes Commission, have been plagued by the difficult choice of placing native Hawaiians on the land without needed infrastructure, or of leasing the land to non-Hawaiians so as to amass capital for infrastructure, or of pursuing a combination of options, including limiting the size of homestead lots, so as to place as many on the land as possible. As many as twelve thousand individuals are on the waiting list for homesteads. Well over five thousand individuals have been awarded homesteads, but many of these individuals have a desire to obtain more land.

This case arises out of the Supreme Court of Hawaii's deployment of the Due Process Clause of the Fourteenth Amendment in a manner that threatens to stop the homesteading program in its tracks. In the decision below, the

Supreme Court of Hawaii held that each of the twenty thousand beneficiaries of the Act has a federally-protected "property right" to "be placed on the land to the fullest extent possible." Although the Supreme Court of Hawaii never defined what this "property right" entails, and never disputed the Commission's unquestioned power to lease lands to non-Hawaiians in order to generate capital, or to establish lot sizes so as to maximize the number of homesteads, the state court held that this "right" was sufficient to trigger not only Due Process protection, but the right to federally-compelled trial-type administrative process prior to every management decision made by the Commission. Left to stand, the state court's decision grants every one of twenty thousand individuals the ability to force the Commission to trial whenever the Commission chooses to allocate the assets of the Homestead Trust corpus in one manner or another. Whether the decision is to build sewers on Maui, to run roads on Molokai, or to make new subdivision lot sizes bigger on Kauai, or smaller on the Big Island, the Supreme Court of Hawaii has effectively granted every native Hawaiian the right to a federally-mandated evidentiary trial before the Commission and Department may take action.

Whether this decision should stand is the issue here.

1. The Hawaiian Homes Commission Act, 42 Stat. 108 (July 9, 1921) ["HHCA" or "Act"], was passed by Congress with its "primary purpose" being "the rehabilitation of native Hawaiians." *Ahuna v. Department of Hawaiian Home Lands*, 64 Haw. 327, 336, 640 P.2d 1161, 1167 (1982). The Act's beneficiaries include those "of not less than one-half part of the blood of the races inhabiting

the Hawaiian Islands previous to 1778," HHCA § 201(7), as well as certain of their descendants, *id.* § 209 (Supp. 1992). The Act authorizes a "homestead" program for these Hawaii natives to be established on certain "available lands" pursuant to the Act's terms. *Id.* §§ 207, 208, 209. Homestead lands are "authorized" for "lease to native Hawaiians" in "acreage limits per each lessee" of "not more than forty acres of agriculture lands or lands used for aquaculture purposes;" "not more than one hundred acres of irrigated pastoral lands and not more than one thousand acres of other pastoral lands;" or "not more than one acre of any class of land to be used as a residence lot[.]" *Id.* § 207(a). "In the management of any retained available lands not required for leasing under section 207(a)," the Department of Hawaiian Home Lands is given the authority to "dispose of those lands to the public, including native Hawaiians, on the same terms, conditions, restrictions, and uses applicable to the disposition of public lands" otherwise owned by the State. *Id.* § 204(2). Section 207(a) provides no standard defining when the Home Lands are "required for leasing" as homesteads to Hawaiians.

2. Leasing to non-Hawaiians, known as "general leasing," has been necessary from the Act's inception by the need for capital to build roads, sewers, water lines, irrigation systems, and utility lines. *See generally Ahia v. Department of Transportation*, 69 Haw. 538, 751 P.2d 81 (1988). Although Congress gave the Commission the authority to draw on lease rents collected on certain general public lands, *see* HHCA §§ 213(a)(1), 213(b)(8), and on appropriations from the State of Hawaii, *id.* §§ 213(a)(3)-(a)(6), these funds have never provided an

income stream large enough to place on the land all, or even a majority, of those on waiting lists for the various Home Lands categories.[1] Indeed, persistent under-funding of the program has made it possible to award only about 38,000 acres to native Hawaiian homesteaders out of the approximately 190,000 acres available for homesteading. *See* 2/13/92 Aff. of Hoaliku Drake at para. 14, 6 Record on Appeal ("R.A.") 1, 17. Meanwhile, the number of potential homesteaders under the Act has increased substantially as the population of eligible beneficiaries

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[1] Indeed, for much of their history, the statutory funding sources set up by Congress were capped in such a manner that receipts in excess of a certain amount were transferred to other Territorial and later State programs. *See, e.g.*, 42 Stat. at 112. Under these caps, whose effect was reinforced by other statutory impediments to the withdrawal of "available lands" for homesteading, the DHHL and its predecessors have been "net exporters" of capital to other territorial and state departments for much of the seventy-five year history of the program. In addition, as documented elsewhere, many thousands of acres of land were also illegally transferred out of the trust via Executive Orders and Governor's Proclamations, mainly during the territorial period. These transfers, to the extent possible, were overturned by Governor George Ariyoshi only in the 1980s. *See State of Hawaii ex rel. Attorney General v. United States*, 676 F. Supp. 1024 (D. Haw. 1989), *aff'd*, 866 F.2d 313 (9th Cir. 1989) (per curiam). As the Supreme Court of Hawaii acknowledged in this case, the State of Hawaii has attempted to redress these diversions from the trust corpus, by repayments from the State's general funds, *e.g.*, the Act of July 1, 1993, 1993 Haw. Sess. L. 996, and by the transfer of 16,000 acres of general public lands back into the trust. *See generally* Haw. H.B. 1828, H.D. 2, S.D. 1, C.D. 1, *returned on procedural grounds and re-enacted as* Haw. H.B. 10-S (June 5, 1995) (confirming 16,000 acre transfer and obligating the State to pay a total of $600 million within the next twenty years to compensate Home Lands trust).

has increased and as greater success in recent years in awarding lease lots has encouraged even more native Hawaiians to place their names on the waiting lists. 5 R.A. 92, 93. Close to twelve thousand native Hawaiians remain on one or more waiting lists. *See* 6 R.A. 1, 17 (Drake Aff.).

3. This case concerns awards of "pastoral lots," potentially the largest-sized lots available in the program. The lands at issue are located in the Waimea district on the Big Island of Hawaii, and consist of lands at Nienie, Puukapu, Kamoku, and Kapulena. Pl. 12/22/89 Exh. 4, 2 R.A. 56. In 1952, the Commission held a lottery among the 187 qualified applicants for pastoral lots in the range of 200-300 acres, and awarded 48 homestead leases. *Id.* at 55, 56, 66, 75. Two of the members of the plaintiff group now known as the "Aged Hawaiians", Theresa B. Lau, and John K. Lindsey, were ranked 78 and 172 in the lottery, and received no land in the 1952 distribution. *Id.* at 65.

4. In its "management of retained lands not required for leasing" under § 204 of the Act, the Commission, following the 1952 awards, chose to place additional land in the Waimea district into general lease. Numerous studies were undertaken periodically to assess the viability of commercial ranching. None indicated that such ranching was clearly sustainable or even desired by large numbers of beneficiaries. A 1964 study by the State's Legislative Reference Bureau, for example, revealed that the Department's relatively low priority for awarding pastoral lots was an "almost inevitable result of social and economic forces beyond the control of those who originally conceived the program." Pl. 1/15/92 Exh. 20, 5

R.A. 134. The urbanization of Hawaii led to "increasing lack of interest on the part of young people in following agricultural pursuits," leading the Department properly to transform "a return to the land, agricultural, rural homesteading program into the rather unique, primarily non-agricultural, homesteading program that now exists." *Id.* A 1974 consultant's report estimated that, to sustain commercial ranching on the Puukapu lands that had yet to be leased for homesteading would require "from 400 to 700 acres," up to more than double the acreage awarded in the 1950s. Pl. 1/15/92 Exh. 1, 5 R.A. 49. Another report, two years later, concluded that, at an award level of 400 acres per lessee, "farming here can be successful [only] if and when State water and agricultural policies affecting this area are resolved." *Id.* Exh. 2, 3, 5 R.A. 57. The Department, in its 1986 report, thus contemplated that the land would have to remain in general lease up until 1988, at a minimum, so as "to aid in developing improvements" that would facilitate farming. *Id.* By 1988, Respondents' own expert estimated that the Puukapu lands could not support a family even at the national poverty level unless awards were made in the range of 400 acres for the oceanward ("makai") sections and 900 acres in the mountainward ("mauka") sections. Pl. 1/22/92 Exh. 16, 5 R.A. 91. By 1990, the Department's expert evaluations concluded that "to achieve the true commercial viability for ranching in Hawaii, including the Waimea and surrounding areas, would require between 1000 and 1200 acres of unirrigated pasture land," that is, land awards at the statutory maximum or beyond. 2/13/92 Drake Aff. ¶ 12, 6 R.A. 17. By contrast, as of 1992, awarding even one fifth of the applicants on the

pastoral waiting list a full 1000-acre grant would exhaust the entire non-homesteaded corpus of Home Lands, leaving more than 10,000 applicants and their families with no hope of ever obtaining a lease lot. *Id.* ¶¶ 6, 12, 14, 6 R.A. 16, 17.

5. As repeated studies confirmed the inappropriateness of awarding "commercial sized" pastoral lots, the Commission took action to distribute Waimea lands to beneficiaries. In July, 1986, as part of an "acceleration" program first proposed by the 1983 Report of the Federal-State Task Force on the Hawaiian Homes Commission Act, Pl. 1/15/92 Exh. 21, 5 R.A. 139, the Commission approved distribution of pastoral lots of 25 acres or more in Waimea, deciding in 1986 to limit the size of such lots to no more than 100 acres. Pl. 12/26/89 Exh. 26 at 6, 2 R.A. 141; Pl. 1/15/92 Exh. 7, 5 R.A. 64. A year later, with a change in administrations, more public meetings, and staff study,[2] Commission staff developed a proposal for pastoral homesteads varying in size "from 5 to 20 acres" having "different levels of improvement depending on

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[2] Public meetings culminated in a 1987 vote by the Commission to delay the 1986 plan for withdrawal of "up to 1,600 acres" at Puukapu out of general leasing, on the basis of Commissioner Ahuna's recognition that "the lot sizes were pared in order to accommodate a larger number of applicants on the waiting list," but that there had not yet been "sufficient dialogue between the Commission and [beneficiaries] with regard to pasture lot sizes." Def. 2/13/92 Exh. "B" to Exh. "C," 6 R.A. 51. This vote led to further staff study, "workshops held with HHC members, discussions with applicants for homestead leases and with existing lessees," and study of "additonal data" "of projected cost/benefits relating to infrastructure development on pastoral homesteads." Pl. 12/22/89 Exh. 26, 2 R.A. 141.

the lot size." Pl. 12/22/89 Exh. 26, 2 R.A. 142. Development of the Puukapu pastoral homestead proposal was aided by guidelines contemporaneously adopted by the Department known as the "ten premises" for award of pastoral lots. *See* 5 R.A. 113-14, 120-27. These premises were based on findings that: (1) the "land use and cost implications" made it infeasible to assist commercial ranching within the parameters of the Act; (2) the Commission had a moral duty to all those on the waiting lists; (3) lands planned for pastoral use could be put to better and higher use as agricultural or residential homesteads; (4) safe human habitation required the placement of infrastructure on all homestead land; (5) DHHL should not spend a greater per capita share of its resources on pastoral as opposed to agricultural or residential lessees; (6) two head of cattle could nonetheless support "the immediate and future consumption needs of a homestead family"; (7) small ranches, known as "ranchettes" of 3 to 5 acres, were already functioning in the private market in Waimea; (8) balancing competing interests would be required to assess the optimum lot size; (9) opportunities for native Hawaiians to ranch commercially should be pursued through the identification of other lands "which should be set aside for commercial ranching by native Hawaiians"; and (10) present lease conditions should be revised to facilitate private financing. Pl. 12/22/89 Exh. 26, 2 R.A. 138. By February, 1989, "work was well underway surveying and staking some 168 10, 15, and 20-acre pastoral lots," with the "awarding of homestead lots" scheduled for summer, 1989." Def. 2/13/92 Exh. "B," 6 R.A. 45-46. On October 2, 1989, DHHL notified applicants on the waiting list that a lot selection meeting would take

place on October 14, 1989, at which time the 166 proposed lots at Puukapu would be offered first to those on the 1952 Waimea Area and then Hawaii Islandwide Pastoral Lease Waiting Lists. Pl. 8/23/90 Exh. "A," 3 R.A. 173. Had DHHL's plan been implemented, it would have placed all of the surviving beneficiaries from the original 1952 waiting list on the land.

6. July, 1989, however, Respondents filed suit in the Circuit Court for the Third Circuit, State of Hawaii claiming that the Commission had violated the Aged Hawaiians' Due Process rights, as well as various provisions of the Act, in breach of 42 U.S.C. § 1983. 1 R.A. 1, 16. Respondents prayed for equitable relief barring the Commission from denying Plaintiffs "the opportunity to obtain larger pastoral lot awards of sufficient size to allow them the opportunity to attain greater self-sufficiency through commercial ranching." *Id.* The Circuit Court, on October 4, 1989, preliminarily enjoined distribution of the Puukapu lots on the basis that the "Ten Premises" were not properly promulgated after notice-and-comment rulemaking procedures, as required by the Hawaii Administrative Procedure Act, but, after rulemaking procedures were complied with, allowed lot selection under a Commission plan to award 166 "lifestyle" ("ranchette") lots in Puukapu, eight 100 acre and eight 200 acre lots in Puukapu, as well as five 100 acre lots in Humuula as "a good faith response to the desires of some of the beneficiaries to commercially ranch." 8/31/90 Aff. of Hardy Spoehr at ¶ 8, 6 R.A. 40. *See also* App. "K" (Order). On September 15, 1990, all of the lots made available were selected by those on the waiting list, with the first 21 applicants allowed a right of first refusal upon

the 100 and 200-acre lots made available by the Commission's 1990 plan. Pl. 1/15/92 Exh. "18-A." One member of the Aged Hawaiians, Sonny Koniho, selected a 121 acre pastoral lot at Humuula, which he then joined with four other lots selected by his brothers. *See* 1/15/92 Koniho Aff. ¶¶ 2, 10, 5 R.A. 169. Nonetheless, Koniho continued to seek "more land for ranching activities." *Id.* ¶ 3. Every one of the Aged Hawaiians was offered the opportunity to take a pastoral lot.

7. Thereafter, Respondents filed an amended complaint that sought nullification of the Ten Premises on additional federal grounds, and a declaration that Petitioners had violated the HHCA and Due Process by refusing Respondents' request for an "economically viable pastoral lot unit," and by denying each of the Respondents a trial-type hearing under the Administrative Procedure Act before doing so. 4 R.A. 241-50. The Circuit Court struck down the Ten Premises as unconstitutionally "vague," but granted summary judgment for the Department and its officials on the ground that the Aged Hawaiians' other claims required an exercise of primary agency jurisdiction. *See* Apps. "C"-"E." The Court then certified this partial summary judgment under Rule 54(b) of the Hawaii Rules of Civil Procedure (which is identical to its federal counterpart). *See* App. "F" (certification).

8. On appeal, the Supreme Court of Hawaii vacated in part, and reversed in part. *See* Pet. App. 49a. The Court rejected the doctrine of agency primary jurisdiction as a defense, because at issue was "the constitutionality of the agency's rules and procedures" and "questions are raised as to whether the agency has operated within the scope of

its authority." *Id.* at 22a. The court also rejected Petitioners' arguments that the Aged Hawaiians' claims had been substantially altered by the 1990 lot awards, and therefore were premature in their present configuration, *id.* at 24a-27a, and that the Aged Hawaiians lacked organizational standing, *id.* at 28a. The court then proceeded to analyze two distinct federal claims: (1) that Petitioners allegedly violated a set of "trust" duties to Respondents, thereby breaching the HHCA, and the "and laws" language of § 1983; and (2) that Petitioners assertedly deprived Respondents of "property" without federally mandated procedural Due Process.

a. With respect to the breach of trust claim, the court rejected Petitioners' claim that the principles of this Court's decision in *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), forbade the enforcement of the HHCA via § 1983. *See* Pet. App. 29a-40a. However, the Court did not enter a final judgment on this claim, finding only that there was a genuine issue of material fact whether ranching on a commercial basis could occur on lots of 1000 acres or less. *See id.* at 9a n.8, and at 41a-43a.

b. As to the Aged Hawaii's federal procedural Due Process claim, however, the court reversed the Circuit Court outright, even though such a remedy was never prayed for on appeal by the Respondents.[3] Petitioners, to

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[3] The Respondent's Opening Brief raised, as the only point of error, whether "[t]he lower court erred when it concluded that the doctrines of primary jurisdiction and exhaustion of administrative remedies barred Appellants from seeking judicial relief under 42 U.S.C. § 1983," Op. Br. at 9, No. 16974 (Haw. filed Sept. 7, 1993), and did not pray for entry of judgment in favor of Respondents. Respondents' prayer in the Supreme

preserve the record, presented argument on the federal constitutional argument as follows:

> First, to the extent Appellant would seek to "carryover" the asserted wrongs inflicted on them by the 1990 distribution, such efforts are barred by their own concessions below that they wish not to disrupt those distributions, and by the analysis of "retrospective" relief set forth in *Pele Defense Fund, supra.*
>
> Second, it is quite clear that Appellant's members do not have any "property" in an "economic unit" award. As the Supreme Court has made clear on any number of occasions, property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understanding that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth,* 408 U.S. 564, 577 (1976). As the foregoing makes clear, the Commission has broad discretion to determine the size of awarded pastoral lots; indeed, circumscription of the Commission's discretion in the way that Plaintiff suggests would potentially require nullifying the hopes of 99 per cent of those on the waiting list for homestead property. Such an absurd reading of the statute should be rejected. Just as a Legislature has the discretion to set welfare benefit levels at particular amounts without individualized procedures, it lies within the Commission's discretion to rule out large awards by "legislative-type" process. Whether

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Court of Hawaii stated: "For the foregoing reasons, Appellants The Aged Hawaiians respectfully request that this Honorable Court reverse the lower court's October 8, 1992 Order and remand this case for trial on the merits." *Id.* at 25.

> notice-and-comment rule making, as codified in Chapter 91, Haw. Rev. Stat., appl[ies] to any "in gross" determinations, the mere expectation of receiving such process is not a "property right" to which due process attaches. *Olim v. Wakinekona*, 461 U.S. 238, 250 n.12 (1983). It is of course true that, once a lease lot is awarded Plaintiff's members have due process rights against its termination. *See In re Smith*, 68 Haw. 466, 719 P.2d 397 (1986). However, here the Plaintiff's members have not yet "acquired . . . specific benefits," *Roth*, 408 U.S. at 576, and have no entitlement to the sort of benefit they claim. Dismissal was thus correct here.
>
> Third, by any notion, Plaintiff's members have received the "process due." Not only was the Plaintiff's representative allowed to make a full-blown presentation to the Commission prior to the 1990 distribution, Plaintiff succeeded in obtaining, from the Commission, not only substantial modifications of the 1989 distribution plan, but also additional pledges by the Commission, at its July 31, 1990, meeting, to provide greater opportunities for aspiring rancher-beneficiaries. Even holding aside the additional process directed by the lower court over our objection, Appellant and its members received overwhelmingly sufficient process. *See Sandy Beach Defense Fund v. City Council*, 70 Haw. 361, 773 P.2d 250 (1989).

Ans. Br. at 34-35, No. 16974 (Haw. filed Nov. 4, 1993).

c. In directing judgment on Respondent's procedural due process claim, the Supreme Court relied on the analysis of its previous decision in *Ahuna v. Department of Hawaiian Home Lands*, 64 Haw. 327, 640 P.2d 1161 (1982), to the effect that the HHCA imposes a duty on the

Commission and the Department to place native Hawaiian beneficiaries "on the land to the fullest extent possible." Pet. App. 45a; *see id.* at 40a (quoting *Ahuna*). This language, which is found nowhere in the Act, warranted the Court to hold that beneficiaries have a right not to be "arbitrarily" denied "the award of an 'economic unit.' " *Id.* at 45a.

d. The Court also found that, as a matter of federal law, the process afforded to Respondents on their claims for *more* land than they got in 1990 was constitutionally deficient. Purporting to invoke the three-part test from *Mathews v. Eldridge*, 424 U.S. 329, 335 (1976), *see* Pet. App. 47a, the Court relied on what it termed the "procedural infirmities" with the 1990 awards, including the non-compliance with rulemaking procedures that led to delay of the awards, the vagueness of the "ten Premises" as was found by the Circuit Court, a "failure to provide adequate notice or opportunity to be heard in conjunction with the development of the 1990 Plan"; the setting of lot sizes of 100 and 200 acres which, in the Court's view, did not "serve any conceivable statutory purpose"; and the denial of a trial type proceeding to one Plaintiff who later dropped out of the litigation. Pet. App. 48a. Based on this cornucopia of asserted wrongdoing, the court held that all of the beneficiaries on the pastoral waiting list (including those who may have been granted other Home Lands) are entitled to the full trial-type process required by the "contested case" procedures established in the Administrative Procedure Act. *See* Pet. App. 49a and App. "N," *Infra.*

REASONS FOR GRANTING THE WRIT

Permitted to stand, the decision of the Supreme Court of Hawaii will have wide-ranging permanent effects on the lives of thousands of native Hawaiians and their families. Those effects will not be positive ones, and, left unreviewed, the decision below will fundamentally restrict the ability of the Department of Hawaiian Home Lands, the Hawaiian Homes Commission, and their officers, to manage this historically underfunded program in the best interests of the beneficiaries. The decision below is not limited to the setting of lot sizes in the Waimea District,[4] and on its face grants every one of twenty thousand beneficiaries of the program, whether they are on the waiting list or not, and whether they have been granted land or not, the right to challenge every spending decision of the Department through trial-type procedures. Because the Department's land and assets are finite, and because the placement-on-the-land-to-the-fullest-extent-possible standard sets no priority among beneficiaries, every beneficiary has the same right under the state court's decision to challenge whether lot sizes in every new subdivision – wherever located – are greater or smaller, or whether roads are to be built in one subdivision, or sewers in another. Given that the Department's asset base is limited not only practically, but legally,[5] the

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[4] Even if it were, the havoc it portends for the homestead program would warrant this Court's review, insofar as the award of large lots on the Big Island threatens to severely limit the number of beneficiaries who may be placed on the home lands.

[5] *Cf. City of Richmond v. J.A. Crosen Co.*, 488 U.S. 469 (1989) (holding that state-created minority benefit programs, not

ability of individual beneficiaries to litigate every "resource allocation" decision threatens to end the Homestead program as a practical matter.

The decision of the Supreme Court of Hawaii, resting as it does on federal grounds, cannot be undone by the Hawaii legislature, nor by amendment of the state constitution. Moreover, given the acknowledged discretion of the Commission to manage the Home Lands in ways that require some beneficiaries to suffer at the expense of others, it is doubtful that the decision below could be rectified even by a congressional repair to the HHCA itself. This court's scarce resources are vitally needed to restore the flexibility which the Hawaiian Homes Commission needs, and is entitled to under federal law, if it is to serve its many beneficiaries efficiently, and without undue delay.

I. Review Should Be Granted to Correct the Supreme Court of Hawaii's Unprecedented Expansion of the Standard for Defining Property Interests that Mandate Due Process.

The decision below cannot be rationalized as simply a misreading of the Act. The Supreme Court of Hawaii never disputed that " 'the Commission has a "special" statutory competence in ascertaining whether lands are "required for leasing" under § 207 of the Act, or may be used for general leasing purposes to facilitate other statutory goals[,]' " Pet. App. 38a n.27. Although the Act gives native Hawaiian beneficiaries a theoretical "opportunity

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within the shelter of Congressional action, are subject to review under the "strict scrutiny" standard).

to pursue commercial ranching activities," *id.* at 41a, the Hawaii Supreme Court's statement that the Act requires placement " 'on the land to the fullest extent possible' " – even if true, which we doubt – does not, given the statute as a whole, create "a legitimate claim of entitlement" to a pastoral lot of any particular size. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The Supreme Court of Hawaii gave no hint that it was retreating from its decision in *Ahia v. Department of Transportation*, 69 Haw. 538, 751 P.2d 81 (1988), that "leasing available lands to generate revenues for the department's administrative and operating budget" is wholly "compatible with the mandate to rehabilitate native Hawaiians through a serious of projects." *Id.* at 550, 751 P.2d at 89. In fact, the Supreme Court of Hawaii recognized that the threat of large lot awards to "the HHCA revenue base and, consequently, the interest of other HHCA beneficiaries" subjected the Commission's rulings only to a basic requirement of "rationality." App. 25a.

This amorphous standard could not possibly give rise to "a legitimate claim of entitlement." *Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 460 (1989). The statute here, like that in *Thompson*, "stops short of requiring that a particular result is to be reached," *id.*, and therefore fails to create a property right. *See id.* at 460 (applying the *Roth* test to analyze whether prisoner has a protected "liberty" interest). When it comes to its concrete application, the placement-on-the-land-to-the-fullest-extent-possible test simply fails "to provide 'particularized standards or criteria [to] guide the State's decisionmakers.' " *Id.* at 462 (quoting *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 467 (1981) (Brennan, J., concurring)). Because the Supreme

Court of Hawaii's own reading of the Act fails to contain "specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow," there is no "claim of entitlement" for Due Process purposes. *Id.* at 463 (citing *Hewitt v. Helms*, 459 U.S. 460, 471-72 (1983)). Although, *Thompson*, *Dumschat*, and *Hewitt* dealt with protected "liberty" as opposed to "property," the state court's decision cannot be explained away on the basis of this difference. Indeed, the Court in *Thompson* expressly viewed the *Roth* test as applying similarly to claims of both "property" and "liberty," and that analysis should have been followed by the Supreme Court of Hawaii. *See* 490 U.S. at 462.

Indeed, the decision below fundamentally conflicts with this Court's leading precedents outlining the sorts of interests which qualify as "property" within the meaning of the Due Process Clause. In *Roth* itself, the leading case in this Court's modern jurisprudence of what constitutes "property," the Court held that a "property interest" arises only from "rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." 408 U.S. at 577. The Supreme Court of Hawaii's placement-on-the-land-to-the-fullest-extent-possible standard simply fails to grant anyone either "certain benefits" or a "claim of entitlement to [such] benefits." Because the Respondents' identified "interest" tells the Commission nothing about which set of native Hawaiians shall be preferred in allocating the Home Lands assets, their claim upon the corpus is no more than a "unilateral expectation" that the Commission will rule their way. *Id.* Such is not the stuff of federally protected "property." *Cf. Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538 (1985) (Employees "entitled to retain

their positions 'during good behavior and efficient service,' " "possessed property rights in continued employment").

When the Government creates a welfare benefit program, and establishes defined eligibility criteria, citizens have "a right to a hearing at which they might attempt" to demonstrate that they are "in fact, within the statutory terms of eligibility." *Roth*, 408 U.S. at 577 (citing *Goldberg v. Kelly*, 397 U.S. 254 (1970)). But this hardly means that citizens have a property right in the allocation of assets to – or even within – the program itself, or even to a particular level of benefits. As in *Atkins v. Parker*, 472 U.S. 115 (1985), this case "does not concern the procedural fairness of individual eligibility determinations," *id.* at 129. Rather, this case implicates an "appraisal of the relative importance of the recipients' needs and the resources available to fund the program." *Id.* And just as "[t]he procedural component of the Due Process Clause does not 'impose a constitutional limitation on the power of Congress to make substantive changes in the law of entitlement to public benefits,' " *id.* (quoting *Richardson v. Belcher*, 404 U.S. 78, 81 (1971)), neither does the Due Process Clause recognize, as federally protected "property," interests in a particular set of eligibility criteria or, a fortiori, in quasi-legislative decisions that lead to changes in such criteria. *Id.* at 130 n.32 (citing, *e.g.*, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432-33 (1982)).[6] The

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[6] *Cf. O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 789 (1980) (quoting the *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1870)) (Due Process constraints apply to "a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power").

Supreme Court of Hawaii's grievous misapplication of *Roth* and its progeny warrants review. A writ should issue.

Indeed, this Court should hold this case pending the decision in *Sandin v. Connor*, No. 93-1911 (U.S. argued Feb. 28, 1995). *Sandin* raises issues similar to those presented in this case, although the subject there is whether a "liberty interest" has been created.[7]

At a very minimum, review should be granted.

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[7] *Sandin* raises questions whether and to what extent concerns for federalism and the judiciary's relative competence to manage large-scale programs should play a role in the ascertainment of federally protected interests under the Due Process Clause, *see* Pet. Br. at 25-37, No. 93-1911 (U.S. filed Nov. 16, 1994), and also presents questions concerning the extent to which some "mandatory" language in a state law gives rise to protected federal interests, *see id.* at 37-48. *See generally Kentucky Department of Corrections v. Thompson*, 490 U.S. at 461-62 & n.3, 464 n.4. This case presents very similar issues.

First, this case raises very serious federalism concerns, insofar as the Hawaii Supreme Court derived the "property" right asserted here from Hawaii's own Admission Act. As this Court has held, courts interpreting such acts should be loathe to imply federal duties. Indeed, because Hawaii's Admission Act welcomed the Fiftieth State into the Union "on an equal footing" with the original thirteen States, burdens on the Home Lands are not to be implied " 'unless the intention was definitely declared or otherwise made very plain.' " *Utah Division of State Lands v. United States*, 482 U.S. 192, 201-02 (1987) (citation omitted). Although this truth amplifies why this Court ought grant plenary review, at least it counsels holding this case pending *Sandin*.

Second, at a minimum this case, like *Sandin* presents the issue of whether the HHCA has "*relevant* mandatory language." 490 U.S. at 464 n.4. The Court's treatment of that issue in *Sandin* will likely – whether the Petitioner in *Sandin* wins or loses – have a bearing on this case. It should be stressed that a

II. Review Should Be Granted to Correct the Supreme Court of Hawaii's Radical Extension of the "Process Due" in Trial-Type Proceedings to Legislative-Style Spending Decisions.

In ordering the Department to provide trial-type hearings to every native Hawaiian beneficiary who desired to challenge the Commission's determination not to grant large pastoral leases, the Supreme Court of Hawaii purported to rely on this Court's general standard, set forth in *Mathews v. Eldridge*, 424 U.S. 325, 335 (1976). *See* Pet. App. 47a. But the Court ignored the most pertinent line of decisions from this Court, which makes clear that the types of quasi-legislative decisions made by the Commission in setting lot sizes, or in determining whether to set lands aside for capital formation, need not be accompanied by trial-type process.[8] For this reason, too, a writ should issue.

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summary remand should be granted even if the Court is "not certain that the case [is] free from all obstacles to reversal on an intervening precedent[.]" *Henry v. City of Rock Hill*, 376 U.S. 776, 776 (1964) (per curiam). It is sufficient that the intervening decision is "sufficiently analogous, and, perhaps, decisive to compel re-examination of the case." *Id.* at 377.

[8] Petitioners brought this line of reasoning to the attention of the Supreme Court of Hawaii by their reliance on *Sandy Beach Defense Fund v. City Council*, 70 Haw. 361, 773 P.2d 250 (1989), which properly held that "adjudicatory type hearing[s]" do not need to be given in basic zoning determinations, even though property owners as close as 300 feet to the zoning change might be affected. *Id.* at 378-79, 773 P.2d at 261. *Sandy Beach* and a host of decisions in other appellate courts, make clear that basic zoning decisions, and, a fortiori, appropriation decisions such as those here, do not require trial-type process. *See, e.g., Fusco v. State of Connecticut*, 815 F.2d 201, 205-06 (2d Cir. 1987); *Chongris v. Board of Appeals of Town of Andover*, 811 F.2d 36, 41 (1st Cir.

As this Court squarely held eighty years ago:

> Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.

Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441, 445 (1915). This fundamental tenet – that quasi-legislative decisions need not be accompanied by any sort of trial-type process – has been continually reaffirmed by this Court, often in strong terms. *See Fleming v. Nestor*, 363 U.S. 603, 608-11 (1960); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 575 (1979); *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 174 (1980); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432-33 (1982). Indeed, only when the object of state action is a "very small number of persons" who are " 'exceptionally affected, in each case upon individual grounds' " are trial-type procedures called for. *Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council*, 435 U.S. 519, 542 (1978) (quoting *United States v. Florida East Coast R. Co.*, 410 U.S. 224, 242, 245 (1973)). In this case, the "interest" identified by the Supreme Court of Hawaii, if it is a "property interest" at all, is one that is shared by every single one of the more

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1987). The conflict between the decision of the Supreme Court of Hawaii and the First and Second Circuits in this case is dramatic and additionally warrants the granting of review in this case.

than twenty thousand beneficiaries of the Hawaiian Homes Commission Act.

The Supreme Court of Hawaii's decision to impose trial-type procedures was grounded more in some notion of "equitable punishment" for state law defects in the promulgation of the original "Ten Premises" and for constitutional defects (i.e., vagueness) in the repromulgated rules than in any established notion of the "process due" upon the particular asset allocation decisions at issue in this case. As such, the Court's response was another example of the "well-known adage that 'two wrongs do not make a right.' " *Gray v. Mississippi*, 481 U.S. 648, 663 (1987). There is no question in the record that Respondents were given a chance orally to comment on the 1990 lot distribution, and Hawaii's public meetings law – Chapter 92, Haw. Rev. Stat.[9] – would require advance

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[9] Haw. Rev. Stat. §§ 92-3 and 92-7 (1985) provide that:
§ 92-3 Open meetings. Every meeting of all boards shall be open to the pubic and all persons shall be permitted to attend any meeting unless otherwise provided in the constitution or as closed pursuant to sections 92-4 and 92-5; provided that the removal of any person or persons who willfully disrupts a meeting to prevent and compromise the conduct of the meeting shall not be prohibited. The boards shall afford all interested persons an opportunity to submit data, views, or arguments, in writing, on any agenda item. The boards shall also afford all interested persons an opportunity to present oral testimony on any agenda item. The boards may provide for reasonable administration of oral testimony by rule.
§ 92-7 Notice. (a) The Board shall give written notice of any regular, special, or rescheduled meeting, or any executive meeting when anticipated in advance. The notice shall include an agenda which

notice of any decision by the Commission to set aside lots of a particular size in the Waimea district. Not even this amount of process, of course, is required by the federal Constitution. "The entire structure of our democratic government rests on the premise that the individual citizen is capable of informing himself about the particular policies

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lists all of the items to be considered at the forthcoming meeting, the date, time, and place of the meeting, and in the case of an executive meeting the purpose shall be stated.

(b) The board shall file the notice in the office of the lieutenant governor or the appropriate county clerk's office, and in the board's office for public inspection, at least six calendar days before the meeting. The notice shall also be posted at the site of the meeting whenever feasible. No board shall change the agenda, once filed, by adding items thereto without a two-thirds recorded vote of all members to which the board is entitled; provided that no item shall be added to the agenda if it is of reasonably major importance and action thereon by the board will affect a significant number of persons. Items of reasonably major importance not decided at a scheduled meeting shall be considered only at a meeting continued to a reasonable day and time.

(c) The board shall maintain a list of names and addresses of persons who request notification of meetings and shall mail a copy of the notice to such persons at their last recorded address no later than the time the agenda is filed under subsection (b).

Hawaii law defines a "board" as including a "commission," such as the Hawaiian Homes Commission, *see* Haw. Rev. Stat. § 92-2(1) (1985), and renders "[a]ny final action taken in violation of sections 92-3 and 92-7" to be "voidable upon proof of willful violation." Executive meetings are narrowly circumscribed and would not permit a final decision on such matters as lot sizes or other spending decisions by the Commission. *See id.* § 92-5.

that affect his destiny," *Atkins v. Parker*, 472 U.S. at 131, and, in this context, "the legislative determination provides all the process that is due." *Logan*, 472 U.S. at 432-33. A writ should issue.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Certiorari and reverse or vacate the judgment of the Supreme Court of Hawaii granting judgment to Respondents on their procedural Due Process claim. The Court may wish to hold this Petition pending the disposition in *Sandin v. Conner*, No. 93-1911 (U.S. argued Feb. 28, 1995). In any case, however, the Court should grant certiorari in this case of vast public importance.

Dated: Honolulu, Hawaii, June 12, 1995.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

THE AGED HAWAIIANS, an unincorporated association, Plaintiffs-Appellants, v. HAWAIIAN HOMES COMMISSION; KALI WATSON, in his capacity as Chairman-designate of the Hawaiian Homes Commission;[1] ANDREW APANA, NANI BRANDT, ROCKNE PREITAS, DENNIS KAUAHI, LLEWELLYN KUMALAE, ANN NATHANIEL AND PATRICIA SHEEHAN, in their capacities as members of the Hawaiian Homes Commission; and THE DEPARTMENT OF HAWAIIAN HOME LANDS, Defendants-Appellees

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[1] The present action was initially instituted on July 17, 1989 against Ilima Pi'ianaia, then-Chairman of the Hawaiian Homes Commission, and Commissioners Andrew Apana, Nani Brandt, Edison Keomaka, Alvina Park, George Robertson and Walter Smith, Jr. After the 1994 general election, and while the case was pending before us, newly elected Governor Benjamin Cayetano appointed Kali Watson to succeed former Chairperson Hoaliku Drake (who had earlier replaced Pi'ianaia) as Chairman of the Hawaiian Homes Commission as of January 1, 1995, subject to the advice and consent of the Senate. *See* Haw. Const. art. V, § 6, ¶ 2 (1978). Pursuant to Hawai'i Rules of Appellate Procedure (HRAP) Rule 43(c)(1), Watson has been substituted automatically for Pi'ianaia as a defendant in the instant case. Similarly, Freitas, Kauahi, Kumalae, Nathaniel and Sheehan have been automatically substituted as Commissioners who were nominated and appointed in accordance with HRS § 26-34 (1985). One seat on the Commission, designated for a resident of 'Oahu, remains vacant after the resignation of Robert McFarlane.

App. 2

NO. 16974

APPEAL FROM THE THIRD CIRCUIT COURT

(CIV. NO. 89-244)

March 14, 1995

MOON, C.J., KLEIN, LEVINSON, NAKAYAMA, AND RAMIL, JJ.

OPINION OF THE COURT BY KLEIN, J.

The Aged Hawaiians, an unincorporated association that includes native Hawaiian beneficiaries under the Hawaiian Homes Commission Act (HHCA),[2] appeal from the third circuit court's order granting in part and denying in part a motion by the Hawaiian Homes Commission (Commission), the individually named members of the Commission, and the Department of Hawaiian Home Lands (DHHL) (collectively the Appellees) to dismiss the Aged Hawaiians' Second Amended Complaint, or alternatively, for summary judgment. Although the factual and procedural elements presented in this appeal are complex, the fundamental issue is whether the circuit court properly dismissed the Aged Hawaiians' federal claims under 42 U.S.C. § 1983.

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[2] *See* HHCA, 1920; Act of July 9, 1921, c. 42, 42 Stat. 108 (codified as amended at 48 U.S.C. note prec. § 491 (1988) and Haw. Const. art. XII, § 1), *reprinted in* 1 Haw. Rev. Stat. 167 (1985) and 1 Haw. Rev. Stat. 39 (Supp. 1992) (herafter, the HHCA will be cited as reprinted in Haw. Rev. Stat.).

I. BACKGROUND

At the inception of the Hawaiian homelands program, the Commission was given control over approximately 200,000 acres of land from which it was to create homesteads for native Hawaiian beneficiaries. The HHCA created three categories of homestead lots: agricultural, pastoral, and residential. *See* 1 Haw. Rev. Stat. 167, 182 (1985) (HHCA, 1920, § 207(a)). This case focuses on the Commission's administration of homelands in the pastoral category.

In 1952, the Commission withdrew 18,000 acres of pastoral land, including portions of Pu'ukapu on the Big Island of Hawai'i, from general leasing (i.e., leases to non-beneficiaries under HHCA § 204) for homesteading. The Commission then selected 187 out of 427 original applicants as the "best qualified" potential pastoral lessees (i.e., those with the maximum chance of success at commercial ranching) and placed them on a waiting list. Forty-eight pastoral homestead lots ranging in size from 200 to 300 acres were awarded to those at the top of that waiting list. The Commission decided not to award lots on the remaining portions of the Pu'ukapu homestead lands "until it [could] be determined whether the rainfall in the vicinity [could] support individual small ranches." While many native Hawaiian beneficiaries remained on the waiting lists for homestead lots, much of the acreage was instead used for general leasing, ostensibly in order to raise revenue to prepare the land for homesteading.[3]

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[3] As of 1989, according to a DHHL annual report, at least 44,000 acres of pastoral land on the Big Island of Hawai'i were under general lease to various entities and individuals who are

Eventually, as part of its 1987 Raw Lands Acceleration Program, the Commission adopted a policy to award pastoral lots of no more than 100 acres based on a "subsistence ranching" concept designed to enable native Hawaiian homesteaders to supplement their family needs. Although no awards were made under this subsistence ranching policy, which formally expired at the end of 1987, the Commission continued to analyze possible future pastoral awards based on this policy.

On July 25, 1988, James Akiona submitted a petition to the Commission seeking a contested case hearing.[4] He hoped to (1) "present evidence of [his] desire and capability to engage in commercial ranching activities at Pu'ukapu" and (2) challenge the potential issuance of subsistence ranching leases because such awards would be inconsistent with HHCA §§ 207 and 219.1.[5] On

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not native Hawaiian homesteaders. In 1956, the waiting list was cancelled without notice to the beneficiaries. During the period from 1956 to 1983, when the waiting list was finally reinstated, the Commission awarded seven pastoral lots in Waimea to persons who were not on the list.

Since the inception of the program in 1920, the Commission has awarded only about 38,000 acres to native Hawaiian homesteaders (in the agricultural, pastoral and residential classes combined) out of the approximately 187,000 acres that were potentially available for all types of homesteading. Additional acreage was added at the end of 1994 to make the trust corpus whole at a little more than 200,000 acres.

[4] At some unknown point before or after Akiona made this request, the individual preceding him on the waiting list passed away.

[5] 1 Haw. Rev. Stat. 167, 182-83 (1985) (HHCA, 1920, §§ 207(a) and (b)) provides, in pertinent part:

December 20, 1988, while Akiona's request was pending, the Commission adopted "ten premises" or guidelines for its pastoral development program.[6]

> **Leases to Hawaiians, licenses.** (a) The department is authorized to lease to native Hawaiians the right to the use and occupancy of a tract or tracts of Hawaiian home lands within the following acreage limits per each lessee: (1) not more than forty acres of agriculture lands or lands used for aquaculture purposes; or (2) *not more than one hundred acres of irrigated pastoral lands and not more than one thousand acres of other pastoral lands;* or (3) not more than one acre of any class of land to be used as a residence lot. . . .
>
> (b) The title to lands so leased shall remain in the [State]. Applications for tracts shall be made to and granted by the department, under such regulations, *not in conflict with any provisions of this title,* as the department may prescribe. The department shall, whenever tracts are available, enter into such a lease with any applicant who, in the opinion of the department, is qualified to perform the conditions of such lease.

(Emphasis added.) 1 Haw. Rev. Stat. 167, 201 (1985) (HHCA, 1920, § 219.1) provides:

> **General assistance.** The department is authorized to carry on any activities it deems necessary to assist the lessees in obtaining maximum utilization of the leased lands, including taking any steps necessary to develop these lands for their highest and best use commensurate with the purposes for which the land is being leased as provided for in section 207, and assisting the lessees in all phases of farming, ranching, and aquaculture operations and the marketing of their agricultural or aquacultural produce and livestock.

[6] The "ten premises" were subsequently promulgated as a rule under Hawai'i Revised Statutes [HRS] chapter 91, pursuant to an order by the third circuit court dated October 4, 1989.

On February 21, 1989, the Commission notified Akiona that it had denied his contested case hearing

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Hawai'i Administrative Rule (HAR) § 10-3-29, entitled "Considerations for pastoral homestead development," provides that "[i]n developing pastoral lots for homestead award, the department shall consider":

(1) That the awarding of pastoral homestead lots is to provide opportunities for a lifestyle which includes allowing for production of livestock to satisfy family needs and supplement family income.

(2) That the needs of applicants on the entire pastoral waiting list will be considered in the awarding of pastoral homestead leases.

(3) That there are competing demands for pastoral homestead development, including demands for residential and agricultural homesteads as well as land for commercial ranching uses.

(4) That basic infrastructure improvements for pastoral homestead lots such as suitable access, water, and utilities should be available.

(5) That the cost per lot for infrastructure improvements for pastoral homestead lots will be comparable with that of residential and agricultural homestead lots. On-going maintenance costs are a factor in this cost per lot equation.

(6) That a minimum pastoral homestead lot size will be based on the land's natural carrying-capacity to support a minimum of two animal units of beef livestock.

(7) That the regional character of communities is important in defining the type and size of homestead lease as similar types of development in the region offer models of what can be done with land for development.

(8) That the determination of pastoral homestead lot size be based on the land's natural carrying-capacity for beef animals, infrastructure development

request. The Commission determined that there was no basis for granting the request because (1) the Commission had not yet initiated any action on Akiona's application for a pastoral homestead lease, (2) there was no substance to support the petition, and (3) a contested case hearing would be inappropriate. Later, the Commission proposed to offer 195 lots (ranging in size from five to twenty acres) on 3,000 acres of Pu'ukapu lands, which were to be awarded in early summer 1989 in accordance with the Commission's "ten premises" rule.[7]

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costs, regional character and beneficiary demand identified through the waiting list.

(9) That opportunities for native Hawaiians to develop commercial ranching opportunities be provided.

(10) That the homestead lease in its current form presents difficulties in financing for commercial ranching operations.

The Commission acknowledged that these premises each have definite implications for pastoral homesteading. For example, through the first premise, "DHHL is indicating that it is not awarding 'economic' pastoral units [i.e., lots capable of supporting commercial ranching]. Rather, it is awarding entitlements which allow for the raising of livestock to satisfy family needs for consumption and for supplementary income. An 'economic unit' by today's standards may consist of 1,000 acres or more of unirrigated pasture." The ninth premise indicates that "DHHL is aware that there are native Hawaiian organizations who desire to develop commercial ranching operations. This premise recognizes this fact and mandates DHHL to identify lands which should be set aside for commercial ranching by Native Hawaiians."

[7] In September 1989, the Commission downsized the Pu'ukapu pastoral development plan to 166 lots ranging from 10 to 20 acres in an attempt to place on the land all surviving beneficiaries from the original 1952 waiting list.

On July 17, 1989, Akiona and the Aged Hawaiians filed a complaint for declaratory and injunctive relief in the third circuit court. On August 31, 1989, Akiona and the Aged Hawaiians moved for partial summary judgment on their claim that the "premises" were rules requiring compliance with the official notice-and-comment provisions of HRS chapter 91. The motion was granted on October 4, 1989, and the trial court issued an order enjoining future pastoral lot awards until the commission complied with chapter 91. On January 30, 1990, the circuit court denied a motion by Akiona and the Aged Hawaiians dated December 26, 1989, in which they sought summary judgment and a permanent injunction with respect to their remaining claims. On the same day, the circuit court also denied their December 28, 1989 motion seeking certification as a class action on behalf of all qualified beneficiaries "who seek a pastoral homestead lot large enough to allow them to become economically self-sufficient by ranching."

Notwithstanding what the Appellees characterize as "serious deficiencies" in the circuit court's October 4, 1989 decision, the Commission and DHHL formally adopted a rule containing the ten premises on May 22, 1990. *See* HAR § 10-3-29, *supra* note 6. At the public hearings held by the Commission prior to this rule-making action, the Aged Hawaiians submitted an alternative procedural proposal for awarding pastoral homestead lots. The Commission declined to adopt the Aged Hawaiians' proposal, but voted unanimously: "[to] address the concerns of those native Hawaiians who have the capability to commercial ranch [sic]; that these native Hawaiians be given the opportunity to do so; and, that [DHHL]

present to [the Commission] a proposal to effectuate commercial ranching." However, the Commission did not suspend the awarding of lots until the DHHL could prepare a proposal, and the record does not indicate that the DHHL has ever presented such a proposal.

On July 31, 1990, a mere ten days after HAR § 10-3-29 was approved by the Governor, the Commission adopted its 1990 pastoral lot size plan (1990 Plan). The Commission took this action without consulting the Aged Hawaiians or Akiona, despite their repeated requests for information and attempts to secure an opportunity to comment. The only substantive change from the 1990 Plan's predecessor was the addition of eight 100 acre and eight 200 acre lots at Pu'ukapu, plus twenty-two unimproved homestead lots of Ka'u (seventeen lots at twenty-five acres each) and Humu'ula (five lots at 100 acres each).[8] The larger lots were not created as "economic units," *see supra* note 6, but as "good faith responses" to

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[8] According to the Appellees, they rejected an alternative plan to award "one or two thousand acre lots" based on information that " 'commercial-scale ranching' is economically impossible in the absence of at a minimum of a full 1,000 acre award[.]" There is a factual dispute, however, on the issue of feasibility. A current homesteader operates a successful commercial ranch on a 305-acre lot, as do other pastoral homestead lessees. DHHL was aware of these enterprises as early as 1985, and apparently reported these facts to the Los Angeles Times. Furthermore, expert testimony presented by the Aged Hawaiians' witnesses indicates that commercial ranching in this area would be feasible on 400 to 900 acres. *See also* discussion of legislative history concerning increased carrying capacity associated with the use of intensive ranching techniques, *infra* section III.B.4.

the desires of those beneficiaries who sought commercial ranching opportunities.

On August 23, 1990, Akiona and the Aged Hawaiians filed two motions: (1) seeking a preliminary injunction to prevent DHHL from awarding subsistence pastoral lots under the 1990 Plan, and (2) seeking to amend their complaint. In denying the motion for preliminary injunction, the circuit court held that the Aged Hawaiians' members would

> not be irreparably harmed [because] their priority status [assures] that they will be offered lots and *they will still be able to litigate the remaining issues* in this case. The issue of whether [the Aged Hawaiians] are likely to prevail on the merits is a *close question*; the public interest favors the awarding of the lots to the beneficiaries.

"Order Denying Motion for Preliminary Injunction; Order Granting Motion to Amend Complaint," dated September 4, 1990. (Emphasis added.)[9] The Aged Hawaiians' first

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[9] The court's decision to deny injunctive relief is understandable given the fact that at least one family suffered irreparable harm as a result of delays caused by the litigation. An applicant on the waiting list died sometime between the October 4, 1989 court order enjoining future pastoral homestead lot awards and the court's September 4, 1990 order denying Akiona and the Aged Hawaiians' motion to enjoin implementation of the 1990 Plan. Although this deceased applicant named his daughter as successor – based on her 25% Hawaiian blood, she would have qualified to succeed in the leasehold interest if it had been awarded – she did not qualify for an award in her own right (50% Hawaiian blood required).

The September 21, 1990 first amended complaint primarily addressed the changed circumstances accompanying adoption and implementation of the 1990 Plan.

amended complaint, which was dated September 21, 1990, addressed the changed circumstances accompanying adoption and subsequent implementation of the 1990 Plan, and also asserted jurisdiction under HRS § 91-14. On September 15, 1990, those on the waiting list selected all of the available lots, with the first twenty-one applicants (including Akiona) allowed a right of first refusal upon the 100 and 200 acre lots.

On September 18, 1990, Akiona and the Aged Hawaiians filed their third motion for summary judgment, which included a request for permanent injunctive relief. The Commission's Chairperson, Hoaliku Drake, responded by sending a letter dated September 21, 1990 to the awardees notifying them of the pending litigation. This letter informed the awardees that the lawsuit by Akiona and the Aged Hawaiians sought "to prohibit the department from issuing you your pastoral lease . . . and challeng[es the Commission's] July 31, 1990[ ] action authorizing the award of the pastoral lots selected on September 15, 1990[.]" One week after Drake wrote her letter, Akiona withdrew from the litigation by stipulation of the parties.[10] Although a hearing on the motion for summary judgment was scheduled to take place on September 28, 1990, the record does not indicate that any action was taken. Evidently, the remaining parties instead entered into consensual mediation in an unsuccessful effort to settle the suit.

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[10] Akiona apparently withdrew after receiving "threats of physical harm."

In the ensuing months, the Aged Hawaiians amended their complaint once again,[11] requested answers to interrogatories, and sought the production of documents by the Appellees. Thereafter, on January 15, 1992, the Aged Hawaiians filed their fourth motion for summary judgment, again requesting permanent injunctive relief. In this motion, the Aged Hawaiians sought:

> 1) [a declaration] that the . . . Commission violated the due process rights of the [Aged Hawaiians] by failing to: (a) provide them with adequate notice of its July 31, 1990 decision determining when, where, and how much pastoral land to award at Pu'ukapu to those on the applicable wait list; and (b) afford them the opportunity to request that an evidentiary hearing be held on [the Commission's] pastoral lot award plan prior to it being adopted on July 31, 1990, in accordance with [HRS] Chapter 91;
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> 2) [a declaration] that pursuant to Sections 207(a), 219.2, and 222 of the HHCA the . . . Commission has a duty to make sufficient land available to [the Aged Hawaiians] and all those like them desiring to commercially ranch on homestead land, in the order of priority established by the appropriate pastoral waiting list;
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> 3) [a declaration] that [HAR §] 10-3-29 is void for vagueness because it provides no clear ascertainable standards by which a beneficiary

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[11] The Appellees stipulated to this amendment. The August 2, 1991 second amended complaint removed Akiona as a named party and replaced the first amended complaint's assertion of jurisdiction under HRS § 91-14 with the original complaint's citations to: HRS §§ 91-7, 603-21.5, 632-1, 661-1, 673-2(a) and (c), and 42 U.S.C. § 1983.

may, prior to the adoption of a pastoral lot award plan, petition for, and receive upon a proper showing, pastoral land of sufficient size to commercially ranch.

4) [a declaration] that under the HHCA, the Commission is under a trust duty to immediately withdraw lands currently under general lease to private ranchers at Humu'ula, Pi'ihonua, Kahua and other appropriate areas in order to make more land available to native Hawaiians on the pastoral waiting list;

5) [a declaration] that [Appellees] are violating 42 U.S.C. Section 1983 by (a) continuing to refuse [the Aged Hawaiians] and other pastoral lot applicants notice and an opportunity for a contested case hearing in advance of their decision to make pastoral lot awards; and (b) foreclosing any future opportunity for [the Aged Hawaiians] and other pastoral lot applicants to obtain a homestead lot award which can provide them the opportunity to become economically self-sufficient; and

6) [to permanently enjoin Appellees] from withholding the opportunity for beneficiaries on the pastoral waiting list to obtain pastoral homestead lots of sufficient size to allow lessees a chance to earn a living by ranching commercially;

7) [to prospectively enjoin] the Commission from awarding any pastoral lot award to beneficiaries other than the September 1990 lot selectees until and unless it complies with the due process clauses of the U.S. and Hawai'i State Constitutions, and [HRS] Chapter 91;

> 8) [an order that Appellees]: (a) plan and develop for court approval a timetable to survey the needs of the appropriate beneficiaries on all pastoral waitlists statewide; and (b) make opportunities available to Plaintiff THE AGED HAWAIIANS, and those desiring economic self-sufficiency on a pastoral homestead lot, to obtain sufficient land of no more than 1,000 acres of unirrigated, or no more than 100 acres of irrigated, pasture land on the island of Hawai'i in the order set by the appropriate waiting list; [and]
>
> 9) [an award of] attorneys' fees pursuant to 42 U.S.C. § 1988.[12]

On the same date, the Appellees filed a motion to dismiss the complaint, or alternatively, for summary judgment.[13] Ultimately, on August 25, 1992, the third circuit court issued an order granting in part and denying in part the Appellees' motion to dismiss, finding that:

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[12] The Aged Hawaiians' request for relief was also made "as a matter of equity in light of [the Appellees'] 40-year unconscionable delay in awarding pastoral lots capable of providing beneficiaries on the 1952 Waimea Wait List with the opportunity to commercially ranch, and since there is no adequate remedy at law."

[13] As summarized by the circuit court in a subsequent order dated March 2, 1993, the Appellees' January 15, 1992 "motion for dismissal [or in the alternative for summary judgment] was based on [the Aged Hawaiians'] failure to request a contested case hearing before filing their complaint and thus [the Aged Hawaiians] had failed to exhaust their administrative remedies before seeking relief pursuant to 42 U.S.C. § 1983 and H.R.S. Chapter 91."

all of [the Aged Hawaiians'] claims in this case, with the exception of its claim under section 91-7, H.R.S., relating to the validity of section 10-3-29, [Hawai'i] Administrative Rules, are susceptible to the initial administrative resolution provided in the [Hawai'i] Administrative Procedures Act by way of a contested case hearing before the . . . Commission. The court further finds that the [DHHL] has adopted formal procedures for contested case hearings established by agency rules and the [Aged Hawaiians have] not filed a written request for a contested case hearing, thus failing to follow administrative procedures.

Moreover, the court finds that [the Aged Hawaiians] still [have] open to [them] administrative procedures which provide an opportunity for an agency hearing and meet the statutory demand for specific procedures culminating in judicial review and that judicial review herein is not available under the Doctrine of Exhaustion of Administrative Remedies until the administrative process has run its course.

Based on the foregoing, . . . (1) [the Commission and DHHL's] Motions with respect to . . . the claim under [§ 91-7] relating to the validity of [HAR] section 10-3-29 . . . are hereby DENIED; and, (2) [the Commission and DHHL's] Motions as to *all other claims* . . . are hereby GRANTED and *all claims, with the exception of the claim under [§ 91-7], are hereby DISMISSED.*

(Citations omitted and emphasis added.)

On September 1, 1992, the circuit court issued a separate order granting in part and denying in part the Aged Hawaiians' fourth motion for summary judgment. In this order, the court found HAR § 10-3-29 void for vagueness, but reserved jurisdiction to consider "whether its subsequent declaratory ruling should require [the Commission] to include a procedure and timetable for the return of trust lands leased to non-beneficiaries." One week later, the Aged Hawaiians filed a motion seeking to alter or amend the court's August 25, 1992 judgment with respect to their § 1983 claims, citing *Felder v. Casey*, 474 U.S. 1037 (1985). On October 8, 1992, the circuit court issued an amended order that merely included the alternative ground of primary jurisdiction as an additional bar to the Aged Hawaiians' request for relief.

The Aged Hawaiians subsequently filed a motion on October 27, 1992 seeking certification of the court's October 8, 1992 amended order, under Hawai'i Rules of Civil Procedure (HRCP) Rule 54(b) (1991). The third circuit court granted the Aged Hawaiians' motion by order filed March 2, 1993. On March 29, 1993, the Aged Hawaiians timely served notice of the present appeal from the circuit court's October 8, 1992 order.

II. APPROPRIATENESS OF CERTIFICATION UNDER HRCP RULE 54(b).

As a preliminary matter, the Appellees contend that the circuit court abused its discretion when it certified the October 8, 1992 order as final pursuant to HRCP Rule

54(b).[14] The Appellees assert that this order did not actually dismiss any claims. Because our jurisdiction to consider this appeal is based on the HRCP Rule 54(b) certification, we must address this issue at the outset. *See Bush v. Hawaiian Homes Comm'n*, 76 Hawai'i 128, 133, 870 P.2d 1272, 1277 (1994).

One of the "prerequisite[s] under [HRCP] Rule 54(b) is that at least one claim . . . must be fully decided." *TBS Pacific, Inc. v. Tamura*, 5 Haw. App. 222, 228, 686 P.2d 37, 43, *reconsideration denied*, 5 Haw. App. 683, 753 P.2d 253, *aff'd mem. op.*, 67 Haw. 682, 744 P.2d 778, *reconsideration denied*, 67 Haw. 684, 744 P.2d 780 (1984). A fully decided but not final judgment, decree, or order becomes final and appealable . . . "[u]pon the court's (1) determination that there is no just reason for delay and (2) direction for the entry of a final judgment pursuant to Rule 54(b)[.]" 5 Haw. App. at 228, 686 P.2d at 43. In the instant case, the October 8, 1992 order specifically dismissed all of the Aged Hawaiians' claims with the exception of their HRS § 91-7 claim. One of the dismissed claims involves the alleged deprivation of federal rights under 42 U.S.C. § 1983,[15] based on Appellees' failure to provide the Aged

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[14] HRCP 54(b) provides in pertinent part:
When more than one claim for relief is presented in an action . . . the court may direct the entry of final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

[15] Title 42 U.S.C. § 1983 provides in relevant part:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . .

Hawaiians with a reasonable opportunity to obtain a pastoral homestead award of sufficient size to support commercial ranching.[16] The remaining HRS § 91-7 claim involves a facial challenge to the validity of an agency rule, HAR § 10-3-29, on the ground that it sets forth no discernible standards for the Commission to follow in making homestead awards.[17]

Because the circuit court "made specific findings setting forth the reasons for its order" dismissing the Aged

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> subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[16] In other words, the § 1983 element of the Aged Hawaiians' claim is that the Commissioners, under color of state law (the HHCA and HRS chapter 91), deprived their members of due process rights under the United States Constitution and their federal statutory rights under the HHCA, as incorporated by the Hawai'i Admission Act.

[17] Although the court reserved jurisdiction to determine whether the Commission should provide for the return of trust lands leased to non-beneficiaries, that issue is distinct from the question whether Appellees must provide HHCA beneficiaries with an opportunity to apply for a pastoral homestead lot of sufficient size for commercial ranching. It is true that once land is set aside, its availability creates an "opportunity" in the abstract. However, even if the circuit court orders the return of these lands, it will not have determined whether the DHHL must, consistent with the HHCA and overlying trust principles, provide a procedure in its rules to consider granting pastoral homestead lots of sufficient size for commercial ranching. Thus, the remaining § 91-7 claim clearly does not encompass the Aged Hawaiians' due process claims under 42 U.S.C. § 1983.

Hawaiians' federal claims, we "must give substantial deference to the lower court's discretion in determining whether an immediate appeal shall lie[.]" *Morrison-Knudsen Co. v. Archer*, 655 F.2d 962, 965 (9th Cir. 1981). Moreover, we agree that the Aged Hawaiians' claims under § 1983 are "severable" from the remaining unadjudicated claim involving HRS § 91-7 and HAR § 10-3-29. *Cf. Morrison*, 655 F.2d at 966 (vacating certification under Federal Rules of Civil Procedure 54(b) because the dismissed claims were "inseverable, both legally and factually, from claims that remain unadjudicated").

III. DISCUSSION

The Aged Hawaiians argue that the circuit court erred when it concluded that the doctrines of primary jurisdiction and exhaustion of administrative remedies bar their claims under 42 U.S.C. § 1983. The Appellees' response is multi faceted:

1) certification was improvidently granted because the issues raised herein are related to the Aged Hawaiians' remaining claims under HRS § 91-7;

2) the issues are not ripe because the Aged Hawaiians have a meaningful chance to obtain contested case hearings;

3) abstention is proper under the primary jurisdiction doctrine where the Commission has discretion to determine whether homestead lands are required for leasing under HHCA § 207;

4) the Aged Hawaiians association is an improper institutional litigant;

5) the Aged Hawaiians have no private federal cause of action under § 1983 or, if such a claim exists, that there is insufficient evidence to support it; and

6) the Commission did not violate the Aged Hawaiians' due process rights because the Aged Hawaiians do not have a property interest in an "economic unit" award (and, in any event, there is no entitlement at all until an individual has "acquired . . . specific benefits"); in the alternative, the Commission provided sufficient process in the circumstances.

The first argument was addressed previously, *see supra* section II, the next three are jurisdictional, *see infra* section III.A, and the last two focus on the merits of the Aged Hawaiians' claims. *See infra* sections III.B and III.C.

A. JURISDICTION AND JUSTICIABILITY

The circuit court dismissed the Aged Hawaiians' federal claims on jurisdictional grounds. In its October 8, 1992 order, the court ruled that "judicial review . . . is not available under the Doctrines of Primary Jurisdiction and Exhaustion of Administrative Remedies until the administrative process has run its course."

1. Exhaustion of Administrative Remedies and the Doctrine of Primary Jurisdiction

The United States Supreme Court expressly held, in *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1981), that "exhaustion of administrative remedies [is] not required as a prerequisite to bringing an action pursuant to § 1983." *Id.* at 516. It is "plain that Congress never intended that those injured by governmental wrongdoers could be required, as a condition of recovery, to submit their claims to the government responsible for their injuries." *Felder v. Casey*, 487 U.S. 131, 142 (1987). Therefore, to the extent that the circuit court relied upon the doctrine of exhaustion, its decision was erroneous.

"[P]rimary jurisdiction is closely related to the doctrine of exhaustion of administrative remedies." B. Schwartz, *Administrative Law* § 8.30 (2d ed. 1984). The main difference, however, is that:

> "Primary jurisdiction" . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body[.] *United States v. Western Pac. R.R.*, 352 U.S. 59, 63-64 (1956). When this happens, "the judicial process is suspended pending referral of such issues to the administrative body for its views." *Id.* at 64[.]

Kona Old Hawaiian Trails Group v. Lyman, 69 Haw. 81, 93, 734 P.2d 161, 168 (1987).[18] The primary jurisdiction doctrine is designed to promote uniformity and consistency in the regulatory process. *Western Pacific R.R.*, 352 U.S. at 64. The doctrine does not apply where a pure question of law is at issue and technical matters calling for the special competence of the administrative expert are not involved. *Id.* at 66. Primary jurisdiction also does not apply where the agency has already rendered its views. *Id.* at 69.

The Appellees contend that we should apply the primary jurisdiction doctrine in the instant case because it is consistent with federal principles of abstention.[19] We are not persuaded. Deference to an agency is particularly inappropriate in cases like this one, in which the constitutionality of the agency's rules and procedures is challenged and questions are raised as to whether the agency has acted within the scope of its authority. The agency is not empowered to decide these questions of law. *Great Northern Ry. v. Merchants Elevator Co.*, 259 U.S. 285, 291 (1922) (reaffirmed in *Western Pacific R.R.*, 352 U.S. at 69).

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[18] "Exhaustion," on the other hand comes into play "where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course." *Kona Old Hawaiian Trails*, 69 Haw. at 93, 734 P.2d at 168 (citing *Western Pacific R.R.*, 352 U.S. at 63).

[19] The Appellees argue that if this case had been brought in federal court, abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315, *reh'g denied*, 320 U.S. 214 (1943), would apply. Consequently, the Appellees contend that application of the primary jurisdiction doctrine in state court would not impermissibly "adulterate or dilute the predominant feature of the federal right[.]" *Felder*, 487 U.S. at 148.

Furthermore, the Appellees have already used their specialized knowledge and expertise to construe the relevant statutory provisions. Accordingly, we hold that the circuit court erred in dismissing the Aged Hawaiians' claims based on the primary jurisdiction doctrine.

2. Finality/Ripeness

Notwithstanding our conclusion in section III.A.1, *supra*, the Appellees essentially argue that the circuit court's decision was right for the wrong reason because additional procedures are available within the agency to address the Aged Hawaiians' claims for relief or other appropriate action. For example, now that leases have been issued, HAR § 10-3-25(a) provides that a "[l]essee of an agricultural or pastoral lot may apply for additional acreage of the same class." In other words, the Appellees urge that the Commission's rules "leave[] open the possibility" that additional pastoral acreage may eventually be made available to lessees, including members of the Aged Hawaiians, so that they can engage in commercially viable ranching activities. Thus, citing *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 193-94 (1984), the Appellees argue that the Aged Hawaiians' § 1983 claims have not yet ripened and the circuit court's order from which they have appealed is not "final."

In *Hamilton Bank*, a case involving a Tennessee planning commission's refusal to approve a proposed development project, the United States Supreme Court held that "the Commission's denial of approval . . . is not a final, reviewable decision." *Id.* at 194. On the other hand,

> *resort to the procedure for obtaining variances would [have] result[ed] in a conclusive determination* by the Commission [as to] whether it would allow [Hamilton Bank] to develop the subdivision in the manner [it] proposed. The Commission's refusal to approve the preliminary plat does not determine that issue; it prevents [Hamilton Bank] from developing its subdivision without obtaining the necessary variances, but *leaves open the possibility* that [Hamilton Bank] may develop the subdivision according to its plat after obtaining the variances.

Id. at 193-94 (emphasis added). The Appellees essentially contend that the Aged Hawaiians should be barred from obtaining judicial review because HAR § 10-3-25(a) provides an opportunity for the agency to consider requests for additional pastoral land.

To the extent that the Appellees rely instead upon the Commission's discretionary power to grant a contested case hearing whenever it determines that one should be held, *see* HAR § 10-3-32(b), the Commission has already demonstrated its resistance to such hearings through its dealings with Akiona.

In any event, notwithstanding the Court's decision in *Hamilton Bank*, "[i]t is not at all clear that the . . . reapplication requirement should apply to substantive due process claims . . . [or that it should apply] in precisely the same manner as in the takings context." *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1576 n.11 (11th Cir.) (citing *Herrington v. Sonoma County*, 857 F.2d 567, 570 (9th Cir. 1988), *amending* 834 F.2d 1488 (9th Cir. 1987), *cert. denied, County of Sonoma v. Herrington*, 489 U.S. 1090 (1989)), *reh'g denied*, 893 F.2d 346 (11th Cir. 1989). In the context of

regulatory takings claims, the reapplication requirement makes sense because it allows the court to decide whether the agency action went "too far[.]" *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Unless denial of an initial application somehow indicates that an agency will not permit any development, or any other "economically viable" use, the takings analysis cannot be performed until final administrative action has taken place. On the other hand, "the focus of due process analysis is . . . *whether it was irrational* for [the Commission] to have [adopted the 1990 Plan in conjunction with HAR § 10-3-29] and to have applied it to [the Aged Hawaiians]." *Eide v. Sarasota County*, 908 F.2d 716, 724 n.12 (11th Cir. 1990) (emphasis added) (quoting *Rogin v. Bensalem Township*, 616 F.2d 680, 689 (3rd Cir. 1980), *cert. denied*, 450 U.S. 1029 (1981)), *cert. denied*, 498 U.S. 1120 (1991). In the context of a due process claim, therefore, the Commission's decision to award subsistence pastoral lots to the Aged Hawaiians is reviewable without further action.

Whether withdrawal of additional lands would jeopardize the HHCA revenue base and, consequently, the interests of other HHCA beneficiaries, bears upon the rationality of the Commission's decision.[20] The existence of such issues should not, however, operate as a bar to the Aged Hawaiians' claims under the doctrine of finality. Thus, we hold that recourse to an agency's contested case procedures is not required as a prerequisite to an action

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[20] This issue is related, in part, to the factual dispute concerning the feasibility of commercial ranching on lots of less than 1,000 acres. *See supra* note 8.

for declaratory and injunctive relief of a prospective nature under 42 U.S.C. § 1983. Accordingly, we adopt the rationale of the Wyoming Supreme Court in *Rogers v. City of Cheyenne*, 747 P.2d 1137 (Wyo. 1987), *appeal dismissed*, 485 U.S. 1017 (1988), which held that federal justiciability standards are inapplicable in state court declaratory judgment actions involving matters of great public importance. *Id.* at 1138-39 (rejecting appellant's non-justiciability argument based on *Hamilton Bank, supra*).

Moreover, even if we were to employ the finality requirement as urged by the Appellees, the doctrine of futility, *see Mathews v. Eldridge*, 424 U.S. 319, 330 (1976), would operate as an exception to the requirement of seeking additional agency action prior to obtaining judicial review. There is a cruel irony to the Appellees' claim that the Aged Hawaiians must wait for final agency action given the drawn-out history of homestead awards. When the Commission created the pastoral wait list in 1952, over thirty years after enactment of the HHCA, it determined that the native Hawaiians on that list were qualified pastoral homestead applicants. The list included current members of the Aged Hawaiians who, after waiting almost forty years on the list, selected pastoral homestead lots in 1990 rather than wait an additional undetermined period in the hope that the Commission would, of its own accord, reconsider the possibility of awarding larger lots sufficient for commercial ranching.[21] Now it appears that those who seek additional acreage

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[21] If Akiona had passed up this opportunity to select a lot, he risked the possibility of dying without receiving an award. *See supra* note 4.

must go to the bottom of the waiting list. HAR §§ 10-3-7, 10-3-24(a) & 10-3-25(b).[22]

The Appellees readily acknowledge that they have limited resources to make awards to beneficiaries already on the waiting list. Moreover, the record in this case reflects that the pastoral waiting list for the island of Hawai'i currently contains over 450 names, and in the past forty years less than 200 awards have been made. There is no indication in the record that any additional land will be made "available" in the near future for homestead awards. Finally, the record indicates that the members of the Aged Hawaiians are all over seventy years old. Under these circumstances, requiring the Aged Hawaiians to wait at the bottom of the waiting list for additional acreage would be clearly futile.

3. Standing

An alternative jurisdictional challenge proffered by the Appellees is that the Aged Hawaiians association does not have standing because the group's claim is not redressable. Appellees claim that resolution of the issues raised in this case requires individualized assessment of each member's ability to engage in commercial ranching.

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[22] HAR § 10-3-25(b) provides that a lessee seeking additional pastoral acreage "shall be contacted for an award in accordance with section 10-3-24(a)." HAR § 10-3-24(a), in turn, provides that such an applicant "shall be contacted in accordance with section 10-3-7" "[w]hen . . . pastoral lots become available for award[.]" Finally, HAR § 10-3-7(b) provides that the DHHL "shall give preference to an applicant who is not a lessee, or whose spouse is not a lessee."

The Aged Hawaiians respond that our state courts are not bound by the federal "case or controversy" requirement when entertaining claims brought under § 1983.

The Aged Hawaiians' due process rights are indeed capable of being redressed without inquiring into the ability of each of its members to engage in commercial ranching. In *Pele Defense Fund v. Paty*, 73 Haw. 578, 837 P.2d 1247 (1992), we rejected a similar argument by the State based upon the " 'generalized' injuries" associated with an alleged "breach of trust responsibilities . . . codified in federal and state law and incorporated into the Hawaii Constitution." 73 Haw. at 593-94 & n.9, 837 P.2d at 1258 & n.9. Application of this principle to the instant case is also consistent with *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333 (1977), which held that where "the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured." 432 U.S. at 343 (citation omitted). Furthermore, the Appellees concede that at least one member of the association seeks more land for ranching activities. State law justiciability policies must be applied as the "needs of justice" require. *Life of the Land v. Land Use Comm'n*, 63 Haw. 166, 176, 623 P.2d 431, 439 (1981).

Accordingly, we hold that the Aged Hawaiians have standing to pursue their claims in the instant case.

B. SECTION 1983 BREACH OF TRUST CLAIM

In order to maintain a claim under § 1983, the Aged Hawaiians must be able to prove that (1) a person acting under color of state law, (2) subjected them, or is threatening to subject them, to the deprivation of a right under the United States Constitution or other federal law. *Makanui v. Board of Educ.*, 6 Haw. App. 397, 404, 721 P.2d 165, 170 (1986). The individual commissioners are clearly persons who were acting under color of state law. The dispute in this case, therefore, focuses on the question of enforceability under § 1983.

The Aged Hawaiians claim that the Appellees have deprived them of their federal rights under the HHCA and the Admission Act, as well as the due process clause of the Fourteenth Amendment to the United States Constitution. We shall address the constitutional due process issue separately. *See infra* section III.C. The Appellees essentially contend that the Aged Hawaiians have failed to state a claim cognizable under § 1983, arguing that: (1) the HHCA is a state law and not a federal law; and (2) the United States Supreme Court's decision in *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), undermines the existence of a private right to sue under § 1983 for the enforcement of breach of trust claims under § 5(f) of the Admission Act.

1. Claims based on the HHCA are matters of federal law

First, we observe that the HHCA was initially enacted by Congress. When Hawai'i gained admission to the Union, the newly formed state accepted responsibility

for the management and operations of the Hawaiian home lands program as a "compact" with the United States. Haw. Const., art. XII, § 2; *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n* (*Keaukaha II*), 739 F.2d 1467, 1469 (9th Cir. 1984); *Ahuna v. Department of Hawaiian Home Lands*, 64 Ha. 327, 337, 640 P.2d 1161, 1168 (1987). As the Ninth Circuit stated almost a decade ago:

> Congress' role in the formation of a compact between the United States and a State is at least as great as Congress' role in approving a compact between two States. In addition, federal law is "an essential element" of a suit that charges a violation of a compact incorporating "the spirit of the [HHCA] looking to the continuance of the Hawaiian homes projects." Haw. Const., art. XII, § 2; art. XII, § 4; art. XVI, § 7; *see Keaukaha II*, 739 F.2d at 1472.

Price v. State of Hawai'i, 764 F.2d 623, 629 (9th Cir. 1985), *cert. denied, Hou Hawaiians v. Hawaii*, 474 U.S. 1055, *reh'g denied*, 475 U.S. 1091 (1986). A federal-state compact, like an interstate compact, is enforceable as a matter of federal law because it derives its powers from Congress and can be amended or repealed only with the consent of Congress.[23] Although the management and disposition of

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[23] We recognize that under § 4 of the Admission Act, Congress gave the State power to amend (through its constitution or State legislation) certain limited provisions of the HHCA *without* congressional consent, including: provisions relating to administration (for example, §§ 202, 213, 219, 220, 222, 224 and 225); provisions relating to the powers and duties of non-administrative officers, such as §§ 204(2), 206 and 212. The State can also, through the same procedures, increase the benefits to lessees of Hawaiian home lands. 1 Haw. Rev. Stat. 86, 86-87 (1985) (Admission Act, 1959, § 4); *see also* Haw. Const. art. XII, § 3.

Hawaiian home lands has been turned over to the State in § 4 of the Admission Act, "Congress enacted . . . a federal public trust, which by its nature creates a federally enforceable right for its beneficiaries to maintain an action against the trustee[24] in breach of the trust." *Price v. Akaka (Akaka II)*, 3 F.3d 1220, 1225 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1645 (1994); *see also Price v. State of Hawai'i*, 764 F.2d at 629; *Keaukaha II*, 739 F.2d at 1571-72; *Ahia v. Department of Transp.*, 69 Haw. 538, 555, 751 P.2d 81, 91 (1988). Furthermore, as the Ninth Circuit has stated, the " 'compact' between [Hawai'i] and the United States *strictly limits the manner in which [Hawai'i] may manage the homelands*[.]" *Price v. Akaka (Akaka I)*, 928 F.2d 824, 826 n.1 (9th Cir. 1990) (emphasis added), *cert. denied*, 502 U.S. 967 (1991); *accord Akaka II*, 3 F.3d at 1222 n.2.

2. Enforceability of the § 1983 claim

Second, we shall consider the Appellees' argument that *Suter* is directly at odds with *Keaukaha II* and other federal cases that allow § 1983 enforcement via § 5(f) of the Admission Act. The Appellees essentially contend that *Suter* supersedes application of the following two-part framework traditionally applied when analyzing § 1983 enforceability issues:

> First, the plaintiff must assert the violation of a federal right. . . . In deciding whether a federal right has been violated, we have considered

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[24] The Commission "is the specific state entity obliged to implement [the Hawaiian home lands trust] on behalf of eligible native Hawaiians." *Ahuna*, 64 Haw. at 338, 640 P.2d at 1168.

> whether the provision in question creates obligations binding on the governmental unit or rather does no more than express a congressional preference for certain kinds of treatment. The interest the plaintiff asserts must not be too vague and amorphous to be beyond the competence of the judiciary to enforce. We have also asked whether the provision in question was intended to benefit the putative plaintiff.
>
> Second, even when the plaintiff has asserted a federal right, the defendant may show that Congress specifically foreclosed a remedy under § 1983, by providing a comprehensive enforcement mechanism for protection of a federal right[.] The availability of administrative mechanisms to protect the plaintiff's interests is not necessarily sufficient to demonstrate that Congress intended to foreclose a § 1983 remedy. Rather the statutory framework must be such that allowing a plaintiff to bring a § 1983 action would be inconsistent with Congress' carefully tailored scheme. The burden to demonstrate that Congress has expressly withdrawn the remedy is on the defendant. We do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for the deprivation of a federally secured right.

Golden Gate Transit Corp. v. City of Los Angeles, 493 U.S. 103, 106-07 (1989) (internal quotations and citations omitted). *See also Wilder v. Virginia Hosp. Ass'n,* 496 U.S. 498 (1990); *Wright v. Roanoke Redevelopment & Housing Auth.,* 479 U.S. 418 (1987); *Smith v. Robinson,* 468 U.S. 992 (1984); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n,* 453 U.S. 1 (1981); *Pennhurst State School and Hospital*

v. Halderman, 451 U.S. 1 (1981); *Maine v. Thiboutot*, 448 U.S. 1 (1980).

In *Suter*, the Court held that the Adoption Assistance and Child Welfare Act (AACWA) does not create rights enforceable in an action under § 1983 because such rights are not "unambiguously conferred" by the AACWA. 112 S. Ct. at 1367-68. The AACWA established a federal reimbursement program for certain expenses incurred by States in administering foster care and adoption services. In order to qualify for reimbursement, States are obligated to submit a plan to the Secretary of Health and Human Services for approval. In order to obtain approval, this plan must provide, inter alia, that the State will undertake "reasonable efforts" to prevent removal of children from their homes and to facilitate reunification of families where removal has occurred. The Secretary has only limited power to enforce this requirement once a State's plan is approved; therefore, within broad limits, compliance with the term "reasonable efforts" is "left up to the State." *Id.* at 1368.

In determining that the hortatory requirements of the AACWA did not establish federal rights actionable under § 1983, the Court in *Suter* distinguished an earlier case that construed the term "reasonable" in the context of a different statute. *Id.* at 1367-68 (citing *Wilder, supra*, which involved Medicaid legislation). The Court in *Wilder* had examined the relevant legislative enactment and found detailed factors that Congress required the States to consider in determining their individual methods for calculating "reasonable and adequate" rates. 496 U.S. at 519 n.17. Construing the term "reasonable" in light of the

legislation as a whole, the Court found that the statutory provisions created a right enforceable under § 1983. *Id.* at 524. Notwithstanding the Court's efforts to distinguish *Wilder* in the *Suter* opinion, it did not expressly or implicitly overrule the traditional § 1983 enforceability framework.

In *Arkansas Medical Society, Inc. v. Reynolds*, 6 F.3d 519 (8th Cir. 1993), the United States Court of Appeals for the Eighth Circuit specifically considered *Suter's* impact on the traditional framework for analyzing § 1983 enforceability issues. The Eighth Circuit concluded that the analysis in *Suter* can be harmonized with the traditional framework. 6 F.3d at 525. Furthermore, none of the other cases cited by the Appellees holds that the traditional framework is no longer valid. *See Stowell v. Ives*, 976 F.2d 65, 68 (1st Cir. 1992) (applying the traditional framework "as reconfigured by the neoteric principles announced in *Suter*").[25]

Suter urges careful scrutiny of the exact legislation at issue, *see* 112 S. Ct. at 1367 (citing *Wilder*, 496 U.S. at 509, and *Wright*, 479 U.S. at 423), and merely reemphasizes the point in *Pennhurst, supra*, that legislation enacted pursuant to Congress's spending power must be imposed unambiguously. 112 S. Ct. at 1366 (citing *Pennhurst*, 451 U.S. at 17, 24). Bearing in mind these considerations, the

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[25] The other case cited by the Appellees, *Resident Council of Allen Parkway Village v. HUD*, 980 F.2d 1043 (5th Cir.), *cert. denied*, 114 S. Ct. 75 (1993), did not decide the question whether *Suter* "effected a sea [of] change in the Court's approach to § 1983," because the legislation in question did not pass the traditional two-part test. 980 F.2d at 1052.

Eighth Circuit applied the traditional framework to its analysis of the same statute involved in *Wilder, supra,* and concluded that Medicaid recipients may legitimately enforce the equal access provision of the AACWA via § 1983. *See Arkansas Medical,* 6 F.3d at 523-28. Like the Eighth Circuit's analysis in *Arkansas Medical,* our inquiry into the relevant statutes in the instant case is also simplified by prior judicial decisions holding that breaches of the Homelands trust can be enforced by native Hawaiian beneficiaries under § 1983.

a.

The initial factor to consider is whether the enactments at issue create a binding obligation or merely express congressional preference for a certain kind of conduct. *Suter,* 112 S. Ct. at 1366-67; *Golden State,* 493 U.S. at 106. Essentially, the Appellees contend that the requirements included in the HHCA and the Admission Act are merely hortatory and not mandatory. Specifically, the Appellees claim that "*Suter* is directly at odds with *Keaukaha II,* and its progeny, for § 5(f) does not 'unambiguously confer' upon native Hawaiian beneficiaries 'a right to enforce' the Admission Act (and, a fortiori, the HHCA)." Nevertheless, in *Akaka II,* the Ninth Circuit held that its:

> decisions in *Keaukaha II,* 739 F.2d at 1472, and *Akaka I,* holding that beneficiaries of the public trust created by Congress may bring a § 1983 claim[,] *are consistent with the Supreme Court's decision in Suter.* Congress enacted the Admission Act, a federal public trust, which by its nature creates a federally enforceable right for

> its beneficiaries to maintain an action against the trustee in breach of the trust.

Akaka II, 3 F.3d at 1225 (emphasis added). Furthermore, in *Pele Defense Fund v. Paty, supra*, we expressly recognized that allowing a private right of action under § 1983 for suits alleging a breach of trust is "consistent with the common law of trusts, in which one whose status as a beneficiary depends on the discretion of the trustee nevertheless may sue to compel the trustee to abide by the terms of the trust." 73 Haw. at 592 n.8, 837 P.2d at 1257 n.8 (citing *Akaka I*, 928 F.2d at 826-27); *see also Akaka II*, 3 F.3d at 1224-25 (citing Restatement (Second) Trusts, §§ 199 & 200 comment).[26] Accordingly, we conclude that the HHCA and the Admission Act impose a binding obligation on the State.

b.

Another factor to consider is whether the statute's language is too vague and amorphous to enforce via § 1983. *Suter*, 112 S. Ct. at 1366-67; *Golden State*, 493 U.S. at 106. The Appellees note that "[a]s in *Suter*, Congress has

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[26] Trust beneficiaries have the right to (a) compel the performance of trust duties, (b) enjoin the commission of a breach of trust by the trustee, and (c) compel the trustee to redress a breach of trust. *Akaka II*, 3 F.3d at 1224-25. With respect to claims against state officials under § 1983, however, claimants cannot recover money damages or the equivalent for past violations of law; nevertheless, relief that is "prospective in nature may be allowed regardless of the state's sovereign immunity." *Pele Defense Fund v. Paty*, 73 Haw. at 609, 837 P.2d at 1266. In the instant case, therefore, the Aged Hawaiians' claims are properly formulated.

'left up to the State' how to comply with Admission Act sections 4 and 5(f), subject only to enforcement by the United States." The Adoption Assistance and Child Welfare Act (AACWA) analyzed in *Suter* "only [went] so far as to ensure that the State have a *plan* approved by the Secretary [of Health and Human Services]." 112 S. Ct. at 1367 (emphasis added). Consequently, the AACWA confers considerable discretion upon the states to provide the particular details, based on the broad features outlined in the statute. 112 S. Ct. at 1369. However, the simple fact that Congress has granted considerable discretion regarding the implementation of statutory requirements is not enough to preclude a finding of judicial enforceability. *See, e.g., Wilder,* 496 U.S. at 519-20; *Wright,* 479 U.S. at 431-32; *Arkansas Medical,* 6 F.3d at 527. Notwithstanding the State's discretionary authority under section 5(f) of the Admission Act – to manage and dispose of lands, proceeds and income generated from the Home land trust "in such manner as the constitution and laws of said State may provide" – section 4 of the Admission Act establishes a "compact" between the United States and Hawai'i that "strictly limits the manner in which [the State] may manage the homelands[.]" *Akaka I,* 928 F.2d at 826 n.1; *accord Akaka II,* 3 F.3d at 1222 n.2. Therefore, the statutory obligations in the instant case are readily distinguishable from the mere requirement of a secretarially-approved "plan" in *Suter.*

Under HHCA § 207(a), qualified native Hawaiian beneficiaries are entitled to lease up to 1,000 acres of unirrigated pastoral land, or up to 100 acres of irrigated pastoral land. Furthermore, HHCA § 207(b) mandates that the DHHL *"shall, whenever tracts are available,* enter

into such a lease with any applicant who, in the opinion of the department, is qualified to perform the conditions of such lease." 1 Haw. Rev. Stat. at 183 (emphasis added). In addition, HHCA § 204(a)(2) provides that available lands "*not required* for leasing under section 207(a)" may be leased to members of the general public. 1 Haw. Rev. Stat. at 49 (emphasis added).[27] We conclude that the judiciary is authorized to enforce the relevant terms of the Admission Act and the HHCA in the instant case.

c.

The final factor to consider is statutory intent to benefit the claimant. *Golden Gate*, 493 U.S. at 106. Native Hawaiians are clearly intended beneficiaries of the public trust established in the HHCA and the Admission Act. Furthermore, because the Aged Hawaiians merely seek prospective relief, it is reasonable to presume that "the remedy, if granted, will inure to the benefit of those members of the association actually injured." *Hunt*, 432 U.S. at 343.

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[27] The Appellees maintain that "the Commission has a 'special' statutory competence in ascertaining whether lands are 'required for leasing' under § 207 of the Act, or may be used for general leasing purposes to facilitate other statutory goals[,]" and therefore, dismissal is appropriate under the primary jurisdiction doctrine. As noted previously, however, *see supra* section III.A.2, we need not wait for further decision-making because the agency already made a determination of availability with respect to the lands covered by its 1990 Plan.

3. The relevant statutes do not preclude § 1983 actions

Under the second prong of the traditional framework for § 1983 enforceability issues, an otherwise viable § 1983 claim may nevertheless be foreclosed if such an action is inconsistent with a comprehensive and carefully tailored remedial scheme constructed by Congress. *Golden Gate*, 493 U.S. at 106-07. In the instant case, the Appellees bear the burden of showing that enforcement under § 1983 would be inconsistent with the remedial provisions of the Admission Act. In *Wilder, supra*, the United States Supreme Court noted that "[o]n only two occasions have we found a remedial scheme established by Congress sufficient to displace the remedy provided in § 1983." 496 U.S. at 521. The federal statutes involved in those cases were: (1) the Education of the Handicapped Act, *Smith v. Robinson*, 468 U.S. at 1010-11; and (2) the Federal Water Pollution Control Act, and the Marine Protection, Research and Sanctuaries Act. *National Sea Clammers Ass'n*, 453 U.S. at 11. Each of these enactments contained elaborate provisions authorizing numerous specific statutory remedies, thereby demonstrating a congressional intent to preclude an alternative remedy under § 1983. By contrast, the only remedy expressly authorized by the HHCA under the Admission Act is suit by the United States; there is no elaborate remedial scheme that the Aged Hawaiians could pursue to enforce their rights. *Cf. Han v. United States Dep't of Justice*, ___ F.3d ___, ___ (9th Cir. 1995) (affirming dismissal of Hawaiian homelands lessees' challenge to the Commission's act of authorizing third party agreements). Thus, the Appellees have not shown that the Admission Act and the HHCA

contain sufficiently comprehensive remedial devices that would justify a conclusion that Congress intended to foreclose § 1983 actions.

4. Application to the instant case

Returning to the first prong of the traditional framework for determining § 1983 enforceability issues, as explicated in *Suter,* and having resolved factors (a), (b), and (c) in the Aged Hawaiians' favor, the question remains whether these claimants met their burden of establishing the violation of a federal right. Notwithstanding a 1985 amendment to the HHCA that eliminated the minimum allowable acreage for a pastoral homestead lot,[28] the Aged Hawaiians claim that the Commission may not simply award lots of any size it chooses because HHCA § 207(a) must be construed in light of the Commission's duty to promote the rehabilitation of native Hawaiians. *See Ahuna,* 64 Haw. at 336, 640 P.2d at 1167 (mentioning the "fiduciary obligation to place beneficiaries of the HHCA . . . on the land to the fullest extent possible"). By amending HHCA § 207(a), the legislature "intend[ed] merely to remove the minimum acreage now specified by law . . . [and] retain the present statutory ceiling on the maximum acreage that can be awarded in

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[28] Congress gave its consent, as required by § 4 of the Admission Act, to this and other HHCA amendments in 1986. *See* Public Law 99-557 (Oct. 27, 1986). Previously, HHCA § 207(a) permitted pastoral lot awards in the following ranges: 100-500 acres of first-class pastoral lands, 250-1000 acres of second-class pastoral lands, and 40-100 acres of irrigated pastoral land.

the case of irrigated pastoral lands[.]" Hse. Stand. Comm. Rep. No. 873, in 1985 House Journal, at 1414; *see also* Sen. Stand. Comm. Rep. No. 480, in 1985 Senate Journal, at 1087-88.

It is true that the legislative history of the HHCA acknowledges DHHL's limited resources and the prohibitive cost of essential site improvements; however, the legislature also expressed its belief that "many existing pastoral leases are *too large* for an individual ranch operation, thereby forcing many homesteaders to enter into grazing agreements with other ranchers, [and that reducing] the . . . size of pastoral lots would allow homesteaders to be more independent in their land use[.] Hse. Stand. Comm. Rep. No. 873, in 1985 House Journal, at 1414 (emphasis added); *see also* Sen. Stand. Comm. Rep. No. 480, in 1985 Senate Journal, at 1088. The legislature also believed that the use of "intensive ranching techniques [would] increase the carrying capacity of a given unit of pasture." Hse. Stand. Comm. Rep. No. 873, in 1985 House Journal, at 1414; *see also* Sen. Stand. Comm. Rep. No. 480, in 1985 Senate Journal, at 1088 ("intensive ranching techniques can now increase the carrying capacity of given acreages two or three times"). Construing this legislative history as a whole, we cannot infer that the legislature intended to deny qualified homesteaders the opportunity to pursue commercial ranching activities.

The Commission and DHHL adopted the subsistence ranching policy in the 1990 Plan based on the implicit conclusion that awarding commercially viable ranching leases would amount to an excessive conferral of benefits on a small minority of beneficiaries at great costs to the larger group, which has been patiently waiting to receive

benefits under the Act. As in *Ahuna*, however, the Commissioners in the instant case "have failed to sufficiently demonstrate that they considered the interests of all beneficiaries." 64 Haw. at 340, 640 P.2d at 1170.

In ruling on a motion for summary judgment, the evidence must be "viewed in the light most favorable to the nonmoving party." *State Farm Mutual Auto. Ins. Co. v. Fermahin*, 73 Haw. 552, 555, 836 P.2d 1074, 1076 (1992). Accordingly, the record in the instant case contains allegations supported by the following facts, which could sustain a finding that the Commission has not treated beneficiaries who seek commercial ranching opportunities fairly: (1) the agency adopted its 1990 Plan without consulting obviously interested parties, despite repeated requests for information by the Aged Hawaiians; (2) the 100 and 200 acre lots included in the Commission's 1990 Plan are clearly not "economic units," but merely represent a "response" to the interests of aspiring commercial ranchers – despite the Commission's unanimous vote to "address the concerns of those native Hawaiians who have the capability to commercial ranch, [so] that [they can] be given the opportunity to do so[,] and [to require] that the [DHHL] present to the [Commission] a proposal to effectuate commercial ranching"; (3) the Commission has still not followed up on this requirement by demanding a commercial ranching proposal from DHHL; and (4) despite the recommendations of a Federal-State Task Force in 1983, the Commission did not make individualized determinations of the applicants' need for pastoral land, or their capacity to engage in such endeavors, before implementing its 1990 Plan. The Aged

Hawaiians are not merely relying upon conclusory assertions. *See Briggs v. Hotel Corp. of the Pac.*, 73 Haw. 276, 281 n.5, 831 P.2d 1335, 1339 n.5 (1992). At the very least, there are genuine issues of material fact as to whether commercial ranching is feasible on lots of less than 1,000 acres. *See supra* note 8. Consequently, summary judgment should not have been granted in favor of the Appellees.

Based on the foregoing analysis, we hold that: (1) the Aged Hawaiians have asserted a viable claim under § 1983 alleging a breach of trust duties by the Appellees under the HHCA (via the Admission Act); and (2) the circuit court erroneously granted summary judgment dismissing the claim. Should the circuit court find a violation of the Aged Hawaiians' federal rights under the HHCA and the Admission Act on remand, an appropriate form of relief would be an injunction preventing the award of additional pastoral land to beneficiaries other than the 1990 selectees until the Commission at least considers applications by any among this group who desire additional pastoral acreage.

C. SECTION 1983 CONSTITUTIONAL DUE PROCESS CLAIM

The Appellees' basic contention in this case is that the Commission's "resource allocation [efforts] . . . meet [ ] the Admission Act's requirement that the Home Lands be devoted to . . . 'the betterment of the conditions of native Hawaiians[,]' . . . even though others would benefit." The Appellees argue further that the individual Commissioners acted within their discretionary authority because § 4 of the Admission Act, which incorporates the

HHCA, does not compel maximum distribution. In other words, the Appellees claim that the Aged Hawaiians have received all the process that is due. The Aged Hawaiians, on the other hand, essentially seek a declaration of their right as trust beneficiaries to a hearing at which they will have the opportunity to demonstrate the appropriateness of an economic unit award in conjunction with an existing entitlement under the HHCA. This procedural due process issue is slightly different from the claim based on the alleged violation of the HHCA and the Admission Act.

A fundamental requirement for a successful due process claim is the deprivation of a property interest. *Pele Defense Fund v. Puna Geothermal Venture*, 77 Hawai'i 64, 68, 881 P.2d 1210, 1214 (1994). Notwithstanding the Appellees' arguments to the contrary, qualified HHCA beneficiaries on homestead waiting lists are entitled to homestead awards. A "property interest" is not limited to "the traditional 'right-privilege' distinction[,] . . . [but also includes] benefit[s] which one is entitled to receive by statute[.]" *Aguiar v. Hawaii Housing Authority*, 55 Haw. 478, 496, 522 P.2d 1255, 1267 (1974); *see also Board of Regents v. Roth*; 408 U.S. 564, 577 (1976). In the instant case, the Aged Hawaiians' claims are based upon valid property interests; therefore, they are not asserting a claim based on the mere "expectation of receiving process . . . without more[.]"[29] *Olim v. Wakinekona*, 461 U.S.

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[29] The instant case is unlike the claim in *Bush, supra*. First, the Aged Hawaiians do not invoke this court's jurisdiction under HRS § 91-14. Second, the proceedings at issue here involve agency decisions that effectively determined the scope

238, 250 n.12 (1983); *see also Roth*, 408 U.S. at 577-78 (citing *Goldberg v. Kelly*, 397 U.S. 254 (1970), and noting that the relevant property interest is "created and defined by statutory terms[,]" the applicability of which the claimants failed to establish in that case).

The scope of the property interests held by HHCA beneficiaries prior to their selection of homestead lots, however, requires further analysis. Although HHCA beneficiaries are not necessarily entitled to "economic units" upon which they can engage in commercial ranching, they are entitled to be placed on the land to the fullest extent possible. *See* discussion *supra* section III.B, concerning the 1985 amendment to HHCA § 207(a). More precisely, the Commission may not arbitrarily preclude the award of an "economic unit."

The HHCA authorizes the Commission and DHHL to: (1) "assist the lessees in obtaining *maximum utilization* of the leased lands, including taking steps necessary to develop these lands for their *highest and best use commensurate with the purposes for which the land is being leased as provided in Section 207*[,]" 1 Haw. Rev. Stat. 167, 201 (1985) (HHCA, 1920, § 219.1) (emphasis added); (2) undertake and carry out general water and development projects, 1 Haw. Rev. Stat. 39, 59-60 (Supp. 1992) (HHCA, as amended, § 220); (3) provide loans for the purchase of livestock and equipment, 1 Haw. Rev. Stat. 39, 56-57

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of the Aged Hawaiians' existing entitlement. Approval of the third party agreements in *Bush*, on the other hand, did not constitute action affecting any "property interest [under] the relevant sections of the HHCA and the HAR." *Bush*, 76 Hawai'i at 136, 870 P.2d at 1280.

(Supp. 1992) (HHCA, as amended, § 214); (4) provide agricultural experts and sufficient water for the watering of livestock, 1 Haw. Rev. Stat. 167, 200 (1985) (HHCA, 1920, § 219); 1 Haw. Rev. Stat. 167, 202-203 (1985) and 1 Haw. Rev. Stat. 39, 62-63 (Supp. 1992) (HHCA, 1920 and as amended, § 221); (5) establish "a permanent land base for the benefit and use of native Hawaiians, upon which they may . . . ranch[,] 1 Haw. Rev. Stat. 39 (Supp. 1992) (HHCA, as provisionally amended, § 101),[30] and (6) provide "financial support and technical assistance to native Hawaiian beneficiaries so that by pursuing strategies to enhance economic self-sufficiency . . . the traditions, culture and quality of life of native Hawaiians shall be forever self-sustaining." *Id.* These provisions contemplate and seek to promote full-time ranching, farming and aquaculture by native Hawaiians on homestead lots.

Although less intense ranching activities of this nature designed to supplement homesteaders' incomes are also appropriate under the HHCA, the Appellees

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[30] Section 101, the "Purpose" clause, was enacted by the Hawai'i legislature in 1990. 1990 Haw. Sess. L. Act 349, § 1 at 1075-76. This amendment is subject to the consent of Congress. *See* 1 Haw. Rev. Stat. 86, 86 (1985) (Admission Act, 1959, § 4). Nevertheless, this language is consistent with judicial decisions based upon the legislative history of the HHCA. One of the HHCA's authors, Senator John H. Wise, specifically stated that the HHCA was intended to "rehabilitate" native Hawaiians by giving them "lands to live on" and "the mode of living that their ancestors were accustomed to" in order to "work[ ] out their own salvation." *See Ahuna*, 64 Haw. at 336 & n.10, 640 P.2d at 1167 & n.10 (citing H.R. Rep. No. 839, 66th Cong., 2d Sess. 4 (1920)); *see also Report of the Federal-State Task Force on the [HHCA]* 14 (August 1983).

must give adequate consideration to applications for homestead awards of a size sufficient for commercial ranching. In the instant case, it appears that some beneficiaries were pressured into accepting smaller pastoral lots without sufficient opportunity to present their case for a larger lot award. These homesteaders must now wait for (1) additional "available lands" to be withdrawn from general leasing, and (2) their names to rise up from the bottom of the new waiting list. The process may not take forty years this time around, but the agency's previous course of action suggests that the Aged Hawaiians' goal of "self-sufficiency" through commercial ranching will not be given serious consideration.

Once a claimant demonstrates a sufficient property interest, the court must balance the following factors to determine the specific procedures required to satisfy due process guaranteed by the fourteenth amendment:

> (1) the private interest which will be affected; (2) the risk of an erroneous deprivation of such interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail.

Kernan v. Tanaka, 75 Haw. 1, 22-23, 856 P.2d 1207, 1219-20 (1993) (citing *Mathews v. Eldridge*, 424 U.S. at 335), *cert. denied*, 114 S. Ct. 1070 (1994). As the circuit court held in its September 4, 1990 order denying the Aged Hawaiians' request for a preliminary injunction, it is indeed a "close

question" whether the Aged Hawaiians' asserted interests should prevail under this test. Nevertheless, the balance of interests is tilted in favor of the private interests based on the procedural infirmities that have already taken place, including: (1) attempted implementation of the "ten premises" as "internal management" measures outside the rule making process; (2) promulgation of vague rules; (3) failure to provide adequate notice or opportunity to be heard in conjunction with the development of the 1990 Plan; (4) awards of 100 and 200 acre lots that do not serve any conceivable statutory purpose; and (5) denial of contested case hearing requests to Akiona prior to the award of homestead lots. Our conclusion is bolstered by the absence of reasonable alternatives for obtaining relief. *Cf. Medeiros v. Hawaii County Planning Comm'n*, 8 Haw. App. 183, 797 P.2d 59, *reconsideration denied*, 8 Haw. App. 661, 868 P.2d 466 (1990).[31] Additional or alternative procedural safeguards would be of considerable value in these circumstances. Accordingly, we hold that HHCA beneficiaries on the pastoral waiting list are

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[31] In *Medeiros*, the Intermediate Court of Appeals had "no doubt that [contested case hearings] would have considerably burdened the process[,]" but noted further that the claimants (unlike the Aged Hawaiians) had recourse to the "reasonable alternative" of mediation, which could serve as a more effective mechanism for obtaining relief than a contested case hearing. 8 Haw. App. at 197-98, 797 P.2d at 67. In the instant case, the Aged Hawaiians made a substantial presentation at the meeting held prior to adoption of the 1990 Plan. Although certain modifications were made to the previous plan after this meeting, and the Aged Hawaiians obtained the Commission's pledge to provide greater opportunities for aspiring rancher-beneficiaries, *the agency, as yet, has not followed through on its promises.*

entitled to contested case hearings at which the Commission must at least consider their applications for pastoral lot awards of sufficient acreage (within the statutory limits) for commercial ranching activities.

IV. CONCLUSION

The doctrines of exhaustion and primary jurisdiction do not bar the Aged Hawaiians' claims under § 1983. Nor do any of the other jurisdictional principles asserted by the Appellees preclude determination of the issues raised in this case. Native Hawaiian beneficiaries of the federal-state compact, which is contained in the Hawai'i Admission Act and incorporates HHCA trust obligations, may pursue claims under § 1983 based upon either the asserted violation of rights under these acts or the due process clause of the fourteenth amendment to the United States Constitution. We hold that: (1) the circuit court's order granting summary judgment in favor of the Appellees and dismissing the Aged Hawaiians' § 1983 claims was erroneous because genuine issues of material fact remain to be decided with respect to the Aged Hawaiians' claim that the 1990 lot awards violated their rights under the HHCA; and (2) the Aged Hawaiians are entitled as a matter of law to summary judgment on their claim that the Commission violated their due process rights when it failed to adequately consider their members' acknowledged desire for land sufficient to engage in commercial ranching. Although HHCA beneficiaries on the pastoral wait list are not entitled to "economic units" *per se*, these individuals must be given an opportunity to seek such an award prior to the implementation of a pastoral homestead lot award plan.

Accordingly, we reverse that part of the circuit court's order dismissing the Aged Hawaiians' constitutional due process claims under § 1983, vacate that portion of the order concerning their breach of trust claims under § 1983, and remand for further proceedings consistent with this opinion.

Paul Nahoa Lucas (Alan T. Murakami with him on the briefs of the Native Hawaiian Legal Corporation) for plaintiffs-appellants.

Steven S. Michaels (Girard D. Lau, Clayton Lee Crowell, Sonia Faust, and George K.K. Kaeo, Jr. with him on the brief), Deputy Attorneys General for defendants-appellees.

Ronald T.Y. Moon
Robert G. Klein
Steven H. Levinson
Paula A. Nakayama
Mario R. Ramil

APPENDIX B

No. 16974

IN THE SUPREME COURT OF THE STATE OF HAWAII

THE AGED HAWAIIANS, an unincorporated association, Plaintiff-Appellant, vs. HAWAIIAN HOMES COMMISSION; KALI WATSON, in his capacity as Chairman of the Hawaiian Homes Commission; ANDREW APANA, NANI BRANDT, ROCKNE FREITAS, DENNIS KAUAHI, LLEWELLYN KUMALAE, ANN NATHANIEL and PATRICIA SHEEHAN, in their capacities as members of the Hawaiian Homes Commission; and THE DEPARTMENT OF HAWAIIAN HOME LANDS, Defendants-Appellees.	) CIVIL NO. CIVIL NO. 89-244 (Injunction))) APPEAL FROM THE AMENDED ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT OR, ALTERNATIVELY FOR SUMMARY JUDGMENT FILED ON OCTOBER 8, 1992)) THIRD CIRCUIT COURT)) HONORABLE SHUNICHI KIMURA JUDGE

NOTICE AND JUDGMENT ON APPEAL

(Filed March 30, 1995)

TO THE HONORABLE PRESIDING JUDGE OF THE FIRST DIVISION, THIRD CIRCUIT COURT, STATE OF HAWAII

PLEASE TAKE NOTICE the following Judgment on Appeal is entered this day by the Supreme Court of the State of Hawaii:

Pursuant to the opinion of the Supreme Court entered on March 14, 1995 the Amended Order Granting in Part and Denying Part Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint Or, Alternatively for Summary Judgment of the Third Circuit Court entered on October 8, 1992, we reverse that part of the Circuit Court's order dismissing the Aged Hawaiians' constitutional due process claims under Section 1983, vacate that portion of the order concerning their breach of trust claims under Section 1983, and remand for further proceedings consistent with this opinion.

DATED: Honolulu, Hawaii, MAR 30 1995, 1995.

BY THE COURT:

K. Miyamura
Clerk

APPROVED:

Robert G. Klein
JUSTICE
(Seal)

APPENDIX C

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

THE AGED HAWAIIANS, an unincorporated association,	) CIVIL NO. 89-244
Plaintiff,	) ORDER GRANTING
vs.	) IN PART AND
	) DENYING IN PART
HAWAIIAN HOMES COMMISSION; HOALIKU DRAKE, in her capacity as Chairman of the Hawaiian Homes Commission; ANDREW APANA, NANI BRANDT, EDISON KEOMAKA, ALVINA PARK, GEORGE ROBERTSON, WALTER SMITH, JR., and DENNIS KAUAHI, in their capacities as members of the Hawaiian Homes Commission; and THE DEPARTMENT OF HAWAIIAN HOME LANDS,	) DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT, OR, ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT
Defendants.	)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT OR, ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT

(Filed Aug. 25, 1992)

The Motion to Dismiss Plaintiff's Second Amended Complaint or, Alternatively, Motion for Summary Judgment by Defendants Hawaiian Homes Commission,

Hoaliku Drake, Andrew Apana, Nani Brandt, Edison Keomaka, Alvina Park, George Robertson, Walter Smith, Jr., Dennis Kauahi and the Department of Hawaiian Home Lands ("Defendants") came on regularly for hearing before this court on February 14, 1992. Kumu B. Vasconcellos and Clayton Lee Crowell, Deputy Attorneys General, appeared on behalf of Defendants and Paul F. N. Lucas, Esq., and Alan T. Murakami, Esq., appeared on behalf of Plaintiff The Aged Hawaiians. The court having considered the arguments of counsel, the supplemental written arguments filed on June 29, 1992, and the records and files herein, hereby grants in part and denies in part Defendants' motions.

The court finds that all of Plaintiff's claims in this case, with the exception of its claim under section 91-7, H.R.S., relating to the validity of section 10-3-29, Hawaii Administrative Rules, are susceptible to the initial administrative resolution provided in the Hawaii Administrative Procedures Act by way of a contested case hearing before the Hawaiian Homes Commission. The court further finds that the Department of Hawaiian Home Lands has adopted formal procedures for contested case hearings established by agency rules and that Plaintiff has not filed a written requested for a contested case hearing, thus failing to follow administrative procedures. *See, e.g., Simpson v. Department of Land and National Resources,* 8 Haw. App. 16, 791 P.2d 1267 (1990).

Moreover, the court finds that Plaintiff still has open to it administrative procedures which provide an opportunity for an agency hearing and meet the statutory demand for specific procedures culminating in judicial review and that judicial review herein is not available

under the Doctrine of Exhaustion of Administrative Remedies until the administrative process has run its course. *Kona Old Hawaiian Trails Group v. Lyman*, 69 Haw. 81, 734 P.2d 161 (1987); *Hawaii Blind Vendors Association v. Department of Human Services*, 71 Haw. 367, 791 P.2d 1261 (1990).

Based on the foregoing, Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint or, Alternatively, Motion for Summary Judgment is granted in part and denied in part as follows: (1) Defendants' Motions with respect to Plaintiff's claim under section 91-7, H.R.S., relating to the validity of section 10-3-29, Hawaii Administrative Rules, are hereby DENIED; and, (2) Defendants' Motions as to all other claims by Plaintiff are hereby GRANTED and all claims, with the exception of the claim under section 91-7, H.R.S., are hereby DISMISSED.

IT IS SO ORDERED.

DATED: Hilo, Hawaii, AUG 25 1992.

SHUNICHI KIMURA (SEAL)
Judge of the Above-Entitled Court

APPROVED AS TO FORM:

/s/ Paul F. N. Lucas
ALAN T. MURAKAMI
PAUL F. N. LUCAS
Attorneys for Plaintiff

APPENDIX D

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT
STATE OF HAWAII

THE AGED HAWAIIANS, an unincorporated association, Plaintiff, vs. HAWAIIAN HOMES COMMISSION, et al., Defendants.	CIVIL NO. 89-244 (Injunction) ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT FILED JANUARY 15, 1992

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT FILED JANUARY 15, 1992

(Filed Sept. 1, 1992)

This matter came on before the Honorable Judge Shunichi Kimura for hearing on February 14, 1992. Paul F.N. Lucas and Alan T. Murakami, appeared for Plaintiffs, and Kumu Vasconcellos and Clayton Lee Crowell appeared for Defendants.

The Court finds that procedural due process requires that a fair process be available [so] to /s/ SK beneficiaries of the Hawaiian Homes Commission Act (HHCA), [have a fair opportunity to obtain sufficient land up to the statutory maximum to ranch commercially in order to earn a decent livelihood. Conversely, Congress intended the homestead program to provide land.] The court [further] finds that Defendants' Administrative Rule

§ 10-3-29, as adopted, [provides no clear procedure or ascertainable standards by which a beneficiary may, prior to the adoption of a pastoral lot award plan, petition for, and receive upon a proper showing, pastoral land of sufficient size to commercially ranch. Accordingly, Administrative Rule 10-3-29] /s/ SK is void for vagueness.

The Court, having thoroughly considered the record and the written and oral arguments of the parties, and having been advised on the issues of this case; therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1) The Plaintiffs' Motion for Summary Judgment is partially granted as to the validity of Hawaii Administrative Rule (H.A.R.) 10-3-29.

2) The court hereby reserves jurisdiction to consider whether its subsequent declaratory ruling should require Defendants to include a procedure and timetable for the return of trust lands leased to non-beneficiaries.

3) All of the remaining claims raised in Plaintiff's Motion for Summary Judgment are denied.

DATED: Hilo, Hawaii, SEP-1 1992.

(Seal)
SHUNICHI KIMURA.
Judge of the above-entitled Court

Unapproved*

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*Per Court memo, dated 7/15/92, Plaintiff's Motion is granted only as to the validity of the rule (10-3-29) pursuant to

/s/ Clayton Lee Crowell
KUMU VASCONCELLOS
CLAYTON LEE CROWELL

HRS, 91-7. Findings set forth in this form are beyond the scope of § 91-7 and, therefore, objectionable.

APPENDIX E

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

THE AGED HAWAIIANS, an unincorporated association, Plaintiff, vs. HAWAIIAN HOMES COMMISSION; HOALIKU DRAKE, in her capacity as Chairman of the Hawaiian Homes Commission; ANDREW APANA, NANI BRANDT, EDISON KEOMAKA, ALVINA PARK, GEORGE ROBERTSON, WALTER SMITH, JR., and DENNIS KAUAHI, in their capacities as members of the Hawaiian Homes Commission; and THE DEPARTMENT OF HAWAIIAN HOME LANDS, Defendants.	CIVIL NO. 89-244 AMENDED ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT OR, ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT

AMENDED ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT OR, ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT

(Filed Oct. 8, 1992)

The Motion to Dismiss Plaintiff's Second Amended Complaint or, Alternatively, Motion for Summary Judgment by Defendants Hawaiian Homes Commission, Hoaliku Drake, Andrew Apana, Nani Brandt, Edison Keomaka, Alvina Park, George Robertson, Walter Smith, Jr., Dennis Kauahi and the Department of Hawaiian Home Lands ("Defendants") came on regularly for hearing before this court on February 14, 1992. Kumu B. Vasconcellos and Clayton Lee Crowell, Deputy Attorneys General, appeared on behalf of Defendants and Paul F. N. Lucas, Esq., and Alan T. Murakami, Esq., appeared on behalf of Plaintiff The Aged Hawaiians. The court having considered the arguments of counsel, the supplemental written arguments filed on June 29, 1992, and the records and files herein, hereby grants in part and denies in part Defendants' motions.

The court finds that all of Plaintiff's claims in this case, with the exception of its claim under section 91-7, H.R.S., relating to the validity of section 10-3-29, Hawaii Administrative Rules, are susceptible to the initial administrative resolution provided in the Hawaii Administrative Procedures Act by way of a contested case hearing before the Hawaiian Homes Commission. The court further finds that the Department of Hawaiian Home Lands has adopted formal procedures for contested case hearings established by agency rules and that Plaintiff has not

filed a written request for a contested case hearing, thus failing to follow administrative procedures. *See, e.g., Simpson v. Department of Land and National Resources,* 8 Haw. App. 16, 791 P.2d 1267 (1990).

Moreover, the court finds that Plaintiff still has open to it administrative procedures which provide an opportunity for an agency hearing and meet the statutory demand for specific procedures culminating in judicial review and that judicial review herein is not available under the Doctrines of Primary Jurisdiction and Exhaustion of Administrative Remedies until the administrative process has run its course. *Kona Old Hawaiian Trails Group v. Lyman,* 69 Haw. 81, 734 P.2d 161 (1987); *Hawaii Blind Vendors Association v. Department of Human Services,* 71 Haw. 367, 791 P.2d 1261 (1990); *Chun v. Employees' Retirement System,* 73 Haw. 9, ___ P.2d ___ (1992).

Based on the foregoing, Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint or, Alternatively, Motion for Summary Judgment is granted in part and denied in part as follows: (1) Defendants' Motions with respect to Plaintiff's claim under section 91-7, H.R.S., relating to the validity of section 10-3-29, Hawaii Administrative Rules, are hereby DENIED; and, (2) Defendants' Motions as to all other claims by Plaintiff are hereby GRANTED and all claims, with the exception of the claim under section 91-7, H.R.S., are hereby DISMISSED.

IT IS SO ORDERED.

DATED: Hilo, Hawaii, OCT-8 1992.

SHUNICHI KIMURA (SEAL)
Judge of the Above-Entitled Court

APPROVED AS TO FORM:

Objection to form (P.L.)
ALAN T. MURAKAMI
PAUL F. N. LUCAS
Attorneys for Plaintiff

APPENDIX F

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

THE AGED HAWAIIANS, an unincorporated association, Plaintiff, vs. HAWAIIAN HOMES COMMISSION; HOALIKU DRAKE, in her capacity as Chairman of the Hawaiian Homes Commission; ANDREW APANA, NANI BRANDT, EDISON KEOMAKA, ALVINA PARK, GEORGE ROBERTSON, WALTER SMITH, JR., and DENNIS KAUAHI, in their capacities as members of the Hawaiian Homes Commission; and THE DEPARTMENT OF HAWAIIAN HOME LANDS, Defendants.	CIVIL NO. 89-244 ORDER GRANTING PLAINTIFF'S MOTION FOR CERTIFICATION OF AMENDED ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT OR, ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT FILED 10-8-92 UNDER RULE 54(B), HAWAII RULES OF CIVIL PROCEDURE DATE: November 4, 1992 TIME: 7:50 a.m. (By telephone conference) JUDGE: Hon. Shunichi Kimura

ORDER GRANTING PLAINTIFF'S MOTION FOR CERTIFICATION OF AMENDED ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT OR, ALTERNATIVELY, MOTION FOR SUMMARY JUDGMENT FILED 10-8-92 UNDER RULE 54(B), HAWAII RULES OF CIVIL PROCEDURE

(Filed Mar. 2, 1993)

Plaintiff's Motion For Certification of Amended Order Granting in Part and Denying in Part Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint or, Alternatively, Motion for Summary Judgment Filed 10-8-92 Under Rule 54(B), Hawaii Rules of Civil Procedure, came on regularly for hearing by telephone conference before this court on November 4, 1992. Clayton Lee Crowell, Deputy Attorney General, appeared on behalf of Defendants and Paul F. N. Lucas, Esq., appeared on behalf of Plaintiff The Aged Hawaiians. The court, having considered the arguments of counsel and the records and files herein, and finding no just reason for delay, and good cause appearing therefore,

IT IS HEREBY ORDERED that Plaintiff's Motion is GRANTED and that the Amended Order Granting in Part and Denying in Part Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint or, Alternatively, Motion for Summary Judgment filed October 8, 1992, shall be entered as a final judgment pursuant to Rule 54(B), Hawaii Rules of Civil Procedure.

DATED: Hilo, Hawaii, MAR-2 1993.

/s/ Shunichi Kimura
Judge of the Above-Entitled Court

APPROVED AS TO FORM:

ALAN T. MURAKAMI
PAUL F. N. LUCAS
Attorneys for Plaintiff

APPENDIX G

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

JAMES AKIONA SR. and THE AGED HAWAIIANS, an unincorporated association, for themselves and on behalf of those similarly situated, Plaintiffs, vs. HAWAIIAN HOMES COMMISSION; ILIMA PIIANAIA, in her capacity as Chairperson of the Hawaiian Homes Commission; ANDREW APANA, NANI BRANDT, EDISON KEOMAKA, ALVINA PARK, GEORGE ROBERTSON and WALTER SMITH, JR., in their capacities as members of the Hawaiian Homes Commission; and THE DEPARTMENT OF HAWAIIAN HOME LANDS, Defendants.	CIVIL NO. 89-244 ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT DATE: September 13, 1989 TIME: 12:00 p.m. JUDGE: Hon. Shunichi Kimura

ORDER GRANTING IN PART PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

(Filed Oct. 4, 1989)

Plaintiffs' Motion For Partial Summary Judgment came on for hearing before the Honorable Shunichi Kimura on September 13, 1989 at 12:00 p.m. Plaintiffs were represented by Alan T. Murakami and Defendants were represented by Clayton Lee Crowell. The Court reviewed the motion and memorandum filed in support, heard and considered the arguments as counsel and was otherwise fully advised. Good cause appearing therefor

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiffs' Motion For Partial Summary Judgment is granted in part and that, pursuant to H.R.S. §91-7(b), this Court declares that:

1) Defendants "premises" adopted by Defendant Hawaiian Homes Commission on December 20, 1988,* [which would in effect restrict the size of all pastoral homestead lots statewide to no more than that needed to support two animal units,] /s/ SK are "rules" as defined in H.R.S. §91-1(4);

2) Defendants violated H.R.S. §§ 91-3 rule-making procedures [and Section 222 of the Hawaiian Homes Commission Act] when [, without prior notice and publication, opportunity for a public hearing, or prior approval of the Governor,] /s/ SK they [improperly] adopted the aforementioned rules[,] without complying with the Hawaii Administrative Procedures Act.

3) [Defendants violated H.R.S. §91-4 by, *inter alia*, failing to file the improperly adopted

rules with the Office of the Lieutenant Governor.] /s/ SK

4) Defendants are preliminarily enjoined from executing the pastoral homestead lot policy adopted on December 20, 1988, [cannot rely upon the December 20, 1988 premises to impose restrictions on the size of new pastoral homestead lot awards contemplated for Puukapu or any other homestead area in the state based on its "premises"] /s/ SK without complying with the rule-making procedures in H.R.S. Chapter 91 and the Hawaiian Homes Commission Act[.] as until further order of this Court. /s/ SK

IT IS FURTHER ORDERED that this Court's partial judgment and order is not dispositive of any other claim raised by Plaintiffs.

DATED: Hilo, Hawaii, 10-4-1989.

/s/ S. Kimura
Judge of the above-entitled Court

* Omit all bracketed materials. /s/ SK

APPROVED AS TO FORM:

CLAYTON LEE CROWELL
Deputy Attorney General for
Department of Hawaiian Home Lands

APPENDIX H

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

JAMES AKIONA SR. and THE AGED HAWAIIANS, an unincorporated association, for themselves and on behalf of those similarly situated, Plaintiffs, vs. HAWAIIAN HOMES COMMISSION; ILIMA PIIANAIA, in her capacity as Chairperson of the Hawaiian Homes Commission; ANDREW APANA, NANI BRANDT, EDISON KEOMAKA, ALVINA PARK, GEORGE ROBERTSON and WALTER SMITH, JR., in their capacities as members of the Hawaiian Homes Commission; and THE DEPARTMENT OF HAWAIIAN HOME LANDS, Defendants.	CIVIL NO. 89-244 ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION; ORDER DATE: September 13, 1989 TIME: 12:00 p.m. JUDGE: Hon. Shunichi Kimura

*ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

(Filed Oct. 4, 1989)

On September 13, 1989, this Court held a hearing on Plaintiffs' Motion for Preliminary Injunction. Counsel Alan T. Murakami represented Plaintiffs and Clayton Lee Crowell appeared for the Defendants. This Court, having read the Motion For Preliminary Injunction, and the accompanying memoranda to the motion and the objections filed by Defendants, and fully considered the arguments of counsel, has ruled as follows:

* All bracketed materials are omitted. /s/ SK.

I. SUCCESS ON THE MERITS

This Court finds that Plaintiffs have prevailed on the issue of whether defendants complied with the rule-making procedures outlined in H.R.S. §§ 91-3, 91-4. *See* Order Granting Plaintiffs' Motion for Partial Summary Judgment.

In sum, Defendants' "premises" guiding their decisions related to a statewide pastoral lot size policy are "rules" pursuant to H.R.S. § 91-1-(4). Accordingly, Defendants' stipulation [concession] /s/ SK that they did [failed to] not follow the rule-making procedures outlined in H.R.S. §§ 91-3, 91-4 render these rules invalid. [However, the Court reserves any ruling on whether the rules are inconsistent with the Hawaiian Homes Commission Act and leaves Plaintiffs without prejudice to raise this issue at a later time.]

II. IRREPARABLE HARM TO PLAINTIFFS

[Furthermore,] Defendants' implementation of the "premises" [actions are causing, and] /s/ SK will cause[,] irreparable injury to Plaintiffs before this action can be fully adjudicated on all claims raised. [Defendants' violation of H.R.S. §§ 91-3, 91-4 constitutes a denial of Plaintiffs' due process rights. H.R.S. Chapter 91 is the statutory law which specifies the procedural rights to which Plaintiffs are entitled. *Aguiar v. Hawaii Housing Authority*, 55 Haw. 478, 495-497 (1974). Section 222 of the Hawaiian Homes Commission Act requires Defendants to promulgate any rule or policy. It is undisputed that Defendants failed to: 1) publish notice of the proposed, policy or rules on pastoral lot sizes; 2) hold a public hearing on the proposals; and 3) afford Plaintiffs the opportunity to submit data, views, evidence, or arguments on the merits of Defendants' proposals.]

[As a result of Defendants' inaction, depriving Plaintiffs of their exercise of procedural due process rights, Plaintiffs suffered, and will continue to suffer, irreparable injury if Defendants are allowed to proceed with their plan to award 168 "lifestyle" lots of no more than 20 acres each at Puukapu. The Court is especially concerned with the interests of and injury to James Akiona, whose place at the head of the waiting list would appear to have assured him a pastoral lot of 300 acres but for: 1) the passage of 37 years, 2) the failure of the past Commissions to follow the wait list in making lot awards in Waimea since 1952, and 3) the recent decision to limit lot awards to land needed to sustain two animal units. He waited nearly four decades for a pastoral homestead lot large enough to provide him the opportunity for greater

economic self-sufficiency. All previous awards of pastoral homestead lots in Waimea were large enough, up to 300 acres, to provide him this opportunity. Defendants' denial of an opportunity for him and those like him, to exercise their due process rights is unconscionable under the circumstances of this situation.] /s/ SK

[The Court is concerned with the Defendants' failure to allow public input before making such a momentous decision affecting the size of all future pastoral homestead lots, especially in light of the specific requirements of the Hawaii Administrative Procedure Act, and H.R.S. §§ 91-3, 91-4 in particular. The Defendants' vague assurances that an opportunity to obtain more homestead land, at some indefinite time in the future, is insufficient to mitigate the impact on Plaintiffs. The award of 20-acre homestead parcels in Puukapu may prejudice the ability of Plaintiff and those like him to commence ranching on the scale that would provide him a reasonable opportunity to succeed. Without sufficient land in the same location, Plaintiffs have no assurance that they can succeed at any attempt to ranch on a self-sufficient basis. Without a firm plan to provide Plaintiffs more acreage in the same location, Defendants plan to award 168 lots in the same area will foreclose options that may prove crucial to Plaintiffs' future ability to succeed as ranchers.]

[Accordingly,] Defendants violated Plaintiffs' [procedural due process] /s/ SK rights as specified in H.R.S. §§ 91-3, 91-4. [and guaranteed under Article I, Section 5 of the Hawaii Constitution and the 14th Amendment to the U.S. Constitution.] This [deprivation of Plaintiff's procedural due process rights] constitutes irreparable

injury for which a preliminary injunction is an appropriate remedy.

III. [HARM TO DEFENDANTS

Simultaneously, there will be insubstantial injury to Defendants by granting this motion as compared to the harm inflicted on Plaintiffs. Defendants only assert that they will be burdened by the administrative delay of making awards to 168 beneficiaries who would otherwise receive awards of pastoral lots in Waimea of up to 20 acres each. The Court is concerned about this delay, in view of Defendants' 37-year delay in making such lots available to those, like Plaintiffs on the 1952 Waimea Pastoral Waiting List. However, this delay is justified on the basis of the serious procedural flaws in Defendants' purported adoption of its statewide pastoral lot size policy.

Accordingly, whatever preliminary delay is required to resolve the fundamental and substantial issues raised by Plaintiffs clearly outweighs the temporary postponement of the planned lot awards.] /s/ SK

IV. PUBLIC INTEREST

Finally, the interest of the public will be upheld. Compliance with the Hawaii Administrative Procedures Act ("H.A.P.A.") and the HHCA is in the fundamental interests of all Hawaii's people. [The Act dictates the steps which the legislature deemed an agency must follow to fairly adopt regulations affecting the private rights

of the public. This Court's discretion is limited to assuring that this mandate is followed. H.R.S. § 91-7(b) mandates this Court to declare any rule void if the agency does not follow H.A.P.A.'s procedural requirements. A preliminary injunction to assure that any future relief granted to Plaintiffs in this action is clearly within the proper discretion of this Court. Unless this Court enjoins Defendants from proceeding on the basis of an invalid rule, H.A.P.A. would be rendered meaningless. Section 222 of the Hawaiian Homes Commission Act also requires Defendants to promulgate their rules and policies in accordance with H.A.P.A.] /s/ SK Accordingly, this Court concludes that this injunction promotes the public interest by assuring compliance with H.A.P.A. and Section 222 of the Hawaiian Homes Commission Act. Therefore,

ORDER

[IT IS HEREBY ORDERED, pursuant to Rule 65, Hawaii Rules of Civil Procedure, that the Motion For Preliminary Injunction is hereby granted without bond.] /s/ SK

IT IS [FURTHER] ORDERED that, subject to any future order by this Court, Defendants and their officers, agents, attorneys and employees are hereby preliminarily enjoined from issuing any pastoral homestead lot awards in Puukapu or elsewhere in the state on the basis of [their policies, like] the December 20, 1988 "premises" for pastoral homestead development until they comply with the rule-making procedures in HRS Chapter 91. [which:

1) in effect limit the size of pastoral lots awarded to less than that specified in Section 207 of the Hawaiian Homes Commission Act, and

2) was or may be later adopted by Defendants without complying with the rule-making procedures set forth in H.R.S. Chapter 91 and Section 222 of the Hawaiian Homes Commission Act.]

DATED: Hilo, Hawaii, 10-4-1989.

/s/ S. Kimura
Judge of the above-entitled Court

APPROVED AS TO FORM:

CLAYTON LEE CROWELL
Deputy Attorney General for
Department of Hawaiian Home
Lands

APPENDIX I

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

JAMES AKIONA SR. and THE AGED HAWAIIANS, an unincorporated association, for themselves and on behalf of those similarly situated, Plaintiffs, vs. HAWAIIAN HOMES COMMISSION; ILIMA PIIANAIA, in her capacity as Chairperson of the Hawaiian Homes Commission, ANDREW APANA, NANI BRANDT, EDISON KEOMAKA, ALVINA PARK, GEORGE ROBERTSON and WALTER SMITH, JR., in their capacities as members of the Hawaiian Homes Commission; and THE DEPARTMENT OF HAWAIIAN HOME LANDS, Defendants.	CIVIL NO. 89-244 ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION DATE OF HEARING: Jan. 19, 1990 TIME: 2:00 p.m. JUDGE: Shunichi Kimura

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION

(Filed Jan. 30, 1990)

Plaintiffs' Motion for Summary Judgment and Permanent Injunction came on for hearing before the Honorable Shunichi Kimura on January 19, 1990. Defendants were represented by Clayton Lee Crowell, Deputy Attorney General, and Plaintiffs were represented by Alan T. Murakami and Paul F. N. Lucas. The Court, having reviewed the record and files herein, and having heard and considered the argument of the parties, and good cause appearing therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiffs' Motion for Summary Judgment and Permanent Injunction be and the same is hereby denied.

DATED: Hilo, Hawaii, January 29, 1990.

/s/ SHUNICHI KIMURA

(Seal)

SHUNICHI KIMURA
JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

/s/ Paul F.N. Lucas
ALAN T. MURAKAMI
PAUL F. N. LUCAS
Attorneys for Plaintiffs

APPENDIX J

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

JAMES AKIONA SR. and THE AGED HAWAIIANS, an unincorporated association, for themselves and on behalf of those similarly situated, Plaintiffs, vs. HAWAIIAN HOMES COMMISSION; ILIMA PIIANAIA, in her capacity as Chairperson of the Hawaiian Homes Commission, ANDREW APANA, NANI BRANDT, EDISON KEOMAKA, ALVINA PARK, GEORGE ROBERTSON and WALTER SMITH, JR., in their capacities as members of the Hawaiian Homes Commission; and THE DEPARTMENT OF HAWAIIAN HOME LANDS, Defendants.	CIVIL NO. 89-244 ORDER DENYING DEFENDANTS' MOTION TO DISMISS, OR ALTER-NATIVELY, FOR SUMMARY JUDGMENT

ORDER DENYING DEFENDANTS' MOTION TO DISMISS, OR ALTERNATIVELY, FOR SUMMARY JUDGMENT

(Filed Feb. 6, 1990)

Defendants' Motion to Dismiss, or Alternatively, for Summary Judgment came on for hearing before the Honorable Shunichi Kimura on January 19, 1990. Defendants were represented by Clayton Lee Crowell and Plaintiffs were represented by Alan T. Murakami and Paul F. N. Lucas. Based upon said hearing, and having fully considered the arguments of counsel, memoranda and exhibits submitted in the record herein,

IT IS ORDERED, ADJUDGED AND DECREED that Defendants' Motion is hereby denied.

DATED: FEB -5 1990, Hilo, Hawaii, _____.

(Seal)

SHUNICHI KIMURA
JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

/s/ Clayton Lee Crowell
CLAYTON LEE CROWELL
Deputy Attorney General
for Defendants

APPENDIX K

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

JAMES AKIONA SR., et al., Plaintiffs, vs. HAWAIIAN HOMES COMMISSION, et al., Defendants.	CIVIL NO. 89-244 (Declaratory Judgments) ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION; ORDER GRANTING MOTION TO AMEND COMPLAINT

ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION; ORDER GRANTING MOTION TO AMEND COMPLAINT

(Filed Sep. 4, 1990)

The Plaintiffs' motions for preliminary injunction and to amend complaint were heard on Friday, August 31, 1990 with counsels ALAN T. MURAKAMI and PAUL F.N. LUCAS (Plaintiffs) and counsels KUMU VASCONCELLOS and CLAYTON LEE CROWELL (Defendants) present.

The Court has considered the written and oral arguments of the parties, the appropriate record, and is fully advised on the issues; therefore, there being good cause,

IT IS ORDERED, ADJUDGED AND DECREED that:

1. The Plaintiffs' Motion For Preliminary Injunction is denied as the Plaintiffs will not be irreparably harmed as their priority status for the leaseholds are such that

they will be offered lots and they will still be able to litigate the remaining issues in this case. The issue of whether the Plaintiffs are likely to prevail on the merits is a close question; the public interest favors the awarding of the lots to the beneficiaries.

2. The Plaintiffs' Motion To Amend The Complaint is granted.

DATED: Hilo, Hawaii, September 4, 1990.

/s/ S. Kimura
Judge of the Above-
Entitled Court
(Seal)

APPENDIX L

THE ADMISSION ACT

An Act to Provide for the Admission of the State of Hawaii into the Union

(Act of March 18, 1959, Pub. L. 86-3, 73 Stat 4)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, subject to the provisions of this Act, and upon issuance of the proclamation required by section 7(c) of this Act, the State of Hawaii is hereby declared to be a State of the United States of America, is declared admitted into the Union on an equal footing with the other States in all respects whatever, and the constitution formed pursuant to the provisions of the Act of the Territorial Legislature of Hawaii entitled "An Act to provide for a constitutional convention, the adoption of a State constitution, and the forwarding of the same to the Congress of the United States, and appropriating money therefor", approved May 20, 1949 (Act 334, Session Laws of Hawaii, 1949), and adopted by a vote of the people of Hawaii in the election held on November 7, 1950, is hereby found to be republican in form and in conformity with the Constitution of the United States and the principles of the Declaration of Independence, and is hereby accepted, ratified, and confirmed.

§2. The State of Hawaii shall consist of all the islands, together with their appurtenant reefs and territorial waters, included in the Territory of Hawaii on the date of enactment of this Act, except the atoll known as Palmyra Island, together with its appurtenant reefs and territorial waters, but said State shall not be deemed to

include the Midway Islands, Johnston Island, Sand Island (off-shore from Johnston Island), or Kingman Reef, together with their appurtenant reefs and territorial waters.

§3. The constitution of the State of Hawaii shall always be republican in form and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence.

§4. As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of said State, as provided in section 7, subsection (b) of this Act, subject to amendment or repeal only with the consent of the United States, and in no other manner: Provided, That (1) sections 202, 213, 219, 220, 222, 224, and 225 and other provisions relating to administration, and paragraph (2) of section 204, sections 206 and 212, and other provisions relating to the powers and duties of officers other than those charged with the administration of said Act, may be amended in the constitution, or in the manner required for State legislation, but the Hawaiian home-loan fund, the Hawaiian home-operating fund, and the Hawaiian home-development fund shall not be reduced or impaired by any such amendment, whether made in the constitution or in the manner required for State legislation, and the encumbrances authorized to be placed on Hawaiian home lands by officers other than those charged with the administration of said Act, shall not be increased, except with the consent of the United States; (2); that any amendment to increase the benefits to lessees of Hawaiian home lands may be made in the

constitution, or in the manner required for State legislation, but the qualifications of lessees shall not be changed except with the consent of the United States; and (3) that all proceeds and income from the "available lands", as defined by said Act, shall be used only in carrying out the provisions of said Act.

§5. (a) Except as provided in subsection (c) of this section, the State of Hawaii and its political subdivisions, as the case may be, shall succeed to the title of the Territory of Hawaii and its subdivisions in those lands and other properties in which the Territory and its subdivisions now hold title.

(b) Except as provided in subsection (c) and (d) of this section, the United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other public property, and to all lands defined as "available lands" by section 203 of the Hawaiian Homes Commission Act, 1920, as amended, within the boundaries of the State of Hawaii, title to which is held by the United States immediately prior to its admission into the Union. The grant hereby made shall be in lieu of any and all grants provided for new States by provisions of law other than this Act, and such grants shall not extend to the State of Hawaii.

(c) Any lands and other properties that, on the date Hawaii is admitted into the Union, are set aside pursuant to law for the use of the United States under any (1) Act of Congress, (2) Executive order, (3) proclamation of the President, or (4) proclamation of the Governor of Hawaii shall remain the property of the United States subject

only to the limitations, if any, imposed under (1), (2), (3), or (4), as the case may be.

(d) Any public lands or other public property that is conveyed to the State of Hawaii by subsection (b) of this section but that, immediately prior to the admission of said State into the Union, is controlled by the United States pursuant to permit, license, or permission, written or verbal, from the Territory of Hawaii or any department thereof may, at any time during the five years following the admission of Hawaii into the Union, be set aside by Act of Congress or by Executive order of the President, made pursuant to law, for the use of the United States, and the lands or property so set aside shall, subject only to valid rights then existing, be the property of the United States. [Am July 12, 1960, Pub L 86-624, 74 Stat 422]

(e) Within five years from the date Hawaii is admitted into the Union, each Federal agency having control over any land or property that is retained by the United States pursuant to subsections (c) and(d) of this section shall report to the President the facts regarding its continued need for such land or property, and if the President determines that the land or property is no longer needed by the United States it shall be conveyed to the State of Hawaii.

(f) The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State of under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the

public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States. The schools and other educational institutions supported, in whole or in part out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the lands granted under this Act shall be used for the support of any sectarian or denominational school, college, or university.

(g) As used in this Act, the term "lands and other properties" includes public lands and other public property, and the term "public lands and other public property" means, and is limited to, the lands and properties that were ceded to the United States by the Republic of Hawaii under the joint resolution of annexation approved July 7, 1898 (30 Stat. 750), or that have been acquired in exchange for lands or properties so ceded.

(h) All laws of the United States reserving to the United States the free use or enjoyment of property which vests in or is conveyed to the State of Hawaii or its political subdivisions pursuant to subsection (a), (b), or (e) of this section or reserving the right to alter, amend, or

repeal laws relating thereto shall cease to be effective upon the admission of the State of Hawaii into the Union.

(i) The Submerged Lands Act of 1953 (Public Law 31, Eighty-third Congress, first session; 67 Stat. 29) and the Outer Continental Shelf Lands Act of 1953 (Public Law 212, Eighty-third Congress, first session, 67 Stat. 462) shall be applicable to the State of Hawaii, and the said State shall have the same rights as do existing States thereunder.

Revised conveyance procedures. Act of December 23, 1963, Pub. L. 88-233, 77 Stat. 472, provides: That (a)(i) whenever after August 21, 1964, any of the public lands and other public property as defined in section 5(g) of Public Law 86-3 (73 Stat. 4, 6), or any lands acquired by the Territory of Hawaii and its subdivisions, which are the property of the United States pursuant to section 5(c) or become the property of the United States pursuant to section 5(d) of Public Law 86-3, except the lands administered pursuant to the Act of August 25, 1916 (39 Stat. 535), as amended, and (ii) whenever any of the lands of the United States on Sand Island, including the reef lands in connection therewith, in the city and county of Honolulu, are determined to be surplus property by the Administrator of General Services (hereinafter referred to as the "Administrator") with the concurrence of the head of the department or agency exercising administration or control over such lands and property, they shall be conveyed to the State of Hawaii by the Administrator subject to the provisions of this Act.

(b) Such lands and property shall be conveyed without monetary consideration, but subject to such other

terms and conditions as the Administrator may prescribe: Provided, That, as a condition precedent to the conveyance of such lands, the Administrator shall require payment by the State of Hawaii of the estimated fair market value, as determined by the Administrator, of any buildings, structures, and other improvements erected and made on such lands after they were set aside. In the event that the State of Hawaii does not agree to any payment prescribed by the Administrator, he may remove, relocate, and otherwise dispose of any such buildings, structures, and other improvements under other applicable laws, or if the Administrator determines that they cannot be removed without substantial damage to them or the lands containing them, he may dispose of them and the lands involved under other applicable laws, but, in such cases he shall pay to the State of Hawaii that portion of any proceeds from such disposal which he estimates to be equal to the value of the lands involved. Nothing in this section shall prevent the disposal by the Administrator under other applicable laws of the lands subject to conveyance to the State of Hawaii under this section if the State of Hawaii so chooses.

Sec. 2. Any lands, property, improvements, and proceeds conveyed or paid to the State of Hawaii under section 1 of this Act shall be considered a part of public trust established by section 5(f) of Public Law 86-3, and shall be subject to the terms and conditions of that trust.

APPENDIX M

HAWAIIAN HOMES COMMISSION ACT, 1920

(Act of July 9, 1921, c 42, 42 Stat 108)

TITLE 1: DEFINITIONS

§ 1. That this Act may be cited as the "Hawaiian Homes Commission Act, 1920."

§2. That when used in this Act the term "Hawaiian Organic Act" means the Act entitled "An Act to provide a government for the Territory of Hawaii," approved April 30, 1900, as amended.

TITLE 2: HAWAIIAN HOMES COMMISSION

§201. [Definitions.] (a) That when used in this title:

(1) The term "commission" means the Hawaiian Homes Commission;

(2) The term "public land" has the same meaning as defined in paragraph (3) of subdivision (a) of section 73 of the Hawaiian Organic Act;

(3) The term "fund" means the Hawaiian home loan fund;

(4) The term "State" means the State of Hawaii;

(5) The term "Hawaiian home lands" means all lands given the status of Hawaiian home lands under the provisions of section 204 of this title;

(6) The term "tract" means any tract of Hawaiian home lands leased, as authorized by section 207 of this title, or any portion of such tract;

(7) The term "native Hawaiian" means any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778;

(8) The term "irrigated pastoral land" means land not in the description of the agricultural land but which, through irrigation, is capable of carrying more livestock the year through than first-class pastoral land.

(b) Any term defined or described in section 347 or 351 of the Revised Laws of Hawaii of 1915, except a term defined in subdivision (a) of this section,

* * *

§204. Control by department of "available lands," return to board of land and natural resources, when. Upon the passage of this Act, all available lands shall immediately assume the status of Hawaiian home lands and be under the control of the department to be used and disposed of in accordance with the provisions of this Act, except that:

(1) In case any available land is under lease by the Territory of Hawaii, by virtue of section 73 of the Hawaiian Organic Act, at the time of the passage of this Act, such land shall not assume the status of Hawaiian home lands until the lease expires or the board of land and natural resources withdraws the lands from the operation of the lease. If the land is covered by a lease containing a withdrawal clause, as provided in section 73(d) of the Hawaiian Organic Act, the board of land and natural resources shall withdraw such lands from the operation of the lease whenever the department gives

notice to the board that the department is of the opinion that the lands are required by it for the purposes of this Act; and such withdrawal shall be held to be for a public purpose within the meaning of that term as used in section 73(d) of the Hawaiian Organic Act.

(2) Any available land, including lands selected by the department out of a larger area, as provided by this Act, not leased as authorized by section 207(a) of this Act, may be returned to the board of land and natural resources as provided under section 212 of this Act, or may be retained for management by the department. Any Hawaiian home lands general lease issued by the department after June 30, 1985, shall contain a withdrawal clause allowing the department to withdraw the land leased at any time during the term of the lease for the purposes of this Act.

In the management of any retained available lands not required for leasing under section 207(a), the department may dispose of those lands to the public, including native Hawaiians, on the same terms, conditions, restrictions, and uses applicable to the disposition of public lands in chapter 171, Hawaii Revised Statutes; provided that the department may not sell or dispose of such lands in fee simple except as authorized under section 205 of this Act; provided further that the department is expressly authorized to negotiate, prior to negotiations with the general public, the disposition of a lease of Hawaiian home lands to a native Hawaiian, or organization

or association owned or controlled by native Hawaiians, for commercial, industrial, or other business purposes, in accordance with the procedure set forth in section 171-59, Hawaii Revised Statutes, subject to the notice requirement of section 171-16(c), Hawaii Revised Statutes, and the lease rental limitation imposed by section 171-17(b), Hawaii Revised Statutes.

(3) The department, with the approval of the Secretary of the Interior, in order to consolidate its holdings or to better effectuate the purposes of this Act, may exchange the title to available lands for land, privately or publicly owned, of an equal value. All lands so acquired by the department shall assume the status of available lands as though the land were originally designated as available lands under section 203 of this Act, and all lands so conveyed by the department shall assume the status of the land for which it was exchanged. The limitations imposed by section 73(l) of the Hawaiian Organic Act and the land laws of Hawaii as to the area and value of land that may be conveyed by way of exchange shall not apply to exchanges made pursuant hereto. No such exchange of land publicly owned by the State shall be made without the approval of two-thirds of the members of the board of land and natural resources. For the purposes of this paragraph, lands "publicly owned" means land owned by a county or the State or the United States. [Am Mar. 27, 1928, c 142, §1, 45 Stat 246; Jul. 10, 1937, c 482, 50 Stat 503; Feb. 20, 1954, c 10, §1, 68 Stat 16; Jun. 18, 1954,

c 319, §1, 68 Stat 262; am L 1963, c 207 §§2, 5(b); am L 1965, c 271, §1; am L 1976, c 24, §1; am Const Con 1978 and election Nov 7, 1978; am L 1985, c 60, §1]

§205. [Sale or lease, limitations on.] Available lands shall be sold or leased only (1) in the manner and for the purposes set out in this title, or (2) as may be necessary to complete any valid agreement of sale or lease in effect at the time of the passage of this Act; except that such limitations shall not apply to the unselected portions of lands from which the department has made a selection and given notice thereof, or failed so to select and give notice within the time limit, as provided in paragraph (3) of section 204 of this title.*

§206. [Other officers not to control Hawaiian home lands; exception.] The powers and duties of the governor and the board of land and natural resources, in respect to lands of the State, shall not extend to lands having the status of Hawaiian home lands, except as specifically provided in this title. [Am L 1963, c 207, §5(a), (b)]

§207. Leases to Hawaiians, licenses. (a) The department is authorized to lease to native Hawaiians the right to the use and occupancy of a tract or tracts of Hawaiian home lands within the following acreage limits per each lessee: (1) not more than forty acres of agriculture lands or lands used for aquaculture purposes; or (2)

---

* The reference was to paragraph (3) of section 204 as originally enacted, which fixed a period of eight years after the first meeting of the commission [department]. The first meeting was held September 20, 1921. [Am L 1963, c 207, §2]

not more than one hundred acres of irrigated pastoral lands and not more than one thousand acres of other pastoral lands; or (3) not more than one acre of any class of land to be used as a residence lot; provided that in the case of any existing lease of a farm lot in the Kalaniansole Settlement on Molokai, a residence lot may exceed one acre but shall not exceed four acres in area, the location of such area to be selected by the department; provided further that a lease granted to any lessee may include two detached farm lots or aquaculture lots, as the case may be, located on the same island and within a reasonable distance of each other, one of which, to be designated by the department, shall be occupied by the lessee as the lessee's home, the gross acreage of both lots not to exceed the maximum acreage of an agricultural, pastoral, or aquaculture lot, as the case may be, as provided in this section. The department is authorized to develop and construct multifamily units for housing native Hawaiians. The method of disposition, as well as the terms, conditions, covenants, and restrictions as to the use and occupancy of such multifamily units shall be prescribed by rules adopted by the department pursuant to chapter 91.

(b) The title to lands so leased shall remain in the [State]. Applications for tracts shall be made to and granted by the department, under such regulations, not in conflict with any provisions of this title, as the department may prescribe. The department shall, whenever tracts are available, enter into such a lease with any applicant who, in the opinion of the department, is qualified to perform the conditions of such lease.

(c)(1) The department is authorized to grant licenses as easements for railroads, telephone lines, electric power and light lines, gas mains, and the like. The department is also authorized to grant licenses for lots within a district in which lands are leased under the provisions of this section, for:

(A) Churches, hospitals, public schools, post offices, and other improvements for public purposes; and

(B) Theaters, garages, service stations, markets, stores, and other mercantile establishments (all of which shall be owned by native Hawaiians or by organizations formed and controlled by native Hawaiians).

(2) The department is also authorized to grant licenses to the United States for reservations, roads, and other rights-of-way, water storage and distribution facilities, and practice target ranges.

(3) Any license issued under this subsection shall be subject to such terms, conditions, and restrictions as the department shall determine and shall not restrict the areas required by the department in carrying on its duties, nor interfere in any way with the department's operation or maintenance activities. [Am Feb. 3, 1923, c 56, §1, 42 Stat 1222; May 16, 1934, c 290, §2, 48 Stat 779; Jul. 10, 1937, c 482, 50 Stat 504; May 31, 1944, c 216, §§3, 4, 58 Stat 264; Jun. 14, 1948, c 464, §§1, 2, 62 Stat 390; Jun. 18, 1954, c 321, §1, 68 Stat 263; Aug 23, 1958, Pub L 85-733, 72 Stat 822; am L 1963, c 207, §2; am L 1981, c 90, §1; am L 1983, c 125, §2; am L 1984, c 27, §1 and c 37, §2; am L 1985, c 69, §1 and c 159, §2]

§208. Conditions of leases. Each lease made under the authority granted the department by section 207 of this Act, and the tract in respect to which the lease is made, shall be deemed subject to the following conditions, whether or not stipulated in the lease:

(1) The original lessee shall be a native Hawaiian, not less than eighteen years of age. In case two lessees either original or in succession marry, they shall choose the lease to be retained, and the remaining lease shall be transferred, quitclaimed, or canceled in accordance with the provisions of succeeding sections.

(2) The lessee shall pay a rental of $1 a year for the tract and the lease shall be for a term of ninety-nine years.

(3) The lessee may be required to occupy and commence to use or cultivate the tract as the person's home or farm or occupy and commence to use the tract for aquaculture purposes, as the case may be, within one year after the lease is made.

(4) The lessee shall thereafter, for at least such part of each year as the department shall prescribe by rules, so occupy and use or cultivate the tract on the person's own behalf.

(5) The lessee shall not in any manner transfer to, or otherwise hold for the benefit of, any other person or group of persons or organizations of any kind, except a native Hawaiian or Hawaiians, and then only upon the approval of the department, or agree so to transfer, or otherwise hold, the person's

interest in the tract. Such interest shall not, except in pursuance of such a transfer to or holding for or agreement with a native Hawaiian or Hawaiians approved of by the department, or for any indebtedness due the department or for taxes, or for any other indebtedness the payment of which has been assured by the department, including loans from other agencies where such loans have been approved by the department, be subject to attachment, levy, or sale upon court process. The lessee shall not sublet the person's interest in the tract or improvements thereon.

(6) Notwithstanding the provisions of paragraph (5), the lessee, with the consent and approval of the commission, may mortgage or pledge the lessee's interest in the tract or improvements thereon to a recognized lending institution authorized to do business as a lending institution in either the State or elsewhere in the United States; provided the loan secured by a mortgage on the lessee's leasehold interest is insured or guaranteed by the Federal Housing Administration, Veterans Administration, or any other federal agency and their respective successors and assigns, which are authorized to insure or guarantee such loans. The mortgagee's interest in any such mortgage shall be freely assignable. Such mortgages, to be effective, must be consented to and approved by the commission and recorded with the department.

Further, notwithstanding the authorized purposes of loan limitations imposed

under section 214 of this Act and the authorized loan amount limitations imposed under section 215 of this Act, loans made by lending institutions as provided in this paragraph, insured or guaranteed by the Federal Housing Administration, Veterans Administration, or any other federal agency and their respective successors and assigns, may be for such purposes and in such amounts, not to exceed the maximum insurable limits, together with such assistance payments and other fees, as established under section 421 of the Housing and Urban Rural Recovery Act of 1983 which amended Title II of the National Housing Act of 1934 by adding section 247, and its implementing regulations, to permit the Secretary of Housing and Urban Development to insure loans secured by a mortgage executed by the homestead lessee covering a homestead lease issued under section 207(a) of this Act and upon which there is located a one to four family single family residence.

(7) The lessee shall pay all taxes assessed upon the tract and improvements thereon. The department may pay such taxes and have a lien therefor as provided by section 216 of this Act.

(8) The lessee shall perform such other conditions, not in conflict with any provision of this Act, as the department may stipulate in the lease; provided that an original lessee shall be exempt from all taxes for the first seven years from date of lease. [Am Jul. 10, 1937, c 482, 50 Stat 504; Nov. 26, 1941, c 544,

§2, 55 Stat 783; Aug. 21, 1958, Pub L 85-710, 72 Stat 706; am L 1963, c 207, §2; am L 1967, c 146, §§1, 2; am L 1973, c 66, §1; am L 1974, c 175, §1; am L 1978, c 229, §5; am L 1981, c 90, §2; am L 1985, c 60, §2 and c 284, §1]

§209. Successors to lessees. (1) Upon the death of the lessee, his interest in the tract or tracts and the improvements thereon, including growing crops and agricultural stock (either on the tract or in any collective contract or program to which the lessee is a party by virtue of his interest in the tract or tracts), shall vest in the relatives of the decedent as provided in this paragraph. From the following relatives of the lessee, husband and wife, children, widows or widowers of the children, grandchildren, brothers and sisters, widows or widowers of the brothers and sisters, or nieces and nephews, the lessee shall designate the person or persons to whom he directs his interest in the tract or tracts to vest upon his death. Such person or persons must be qualified to be a lessee of Hawaiian home lands; provided that Hawaiian blood requirements shall not apply to the descendants of those who are not native Hawaiians but who were entitled to the leased lands under the provisions of section 3 of the Act of May 16, 1934 (48 Stat. 777, 779), as amended; provided further that such person or persons need not be twenty-one years of age. Such designation shall be in writing, shall be specified at the time of execution of such lease with a right in such lessee in similar manner to change such beneficiary at any time and shall be filed with the department and approved by the department in order to be effective to vest such interests in the successor or successors so named.

In the absence of such a designation as approved by the department, the department shall select from the relatives of the lessee in order named above as limited by the foregoing paragraph one or more persons who are qualified to be lessees of Hawaiian home lands, except as hereinabove provided, as the successor or successors of the lessee's interest in the tract or tracts, and upon the death of the lessee, his interest shall vest in the person or persons so selected. The department may select such a successor or successors after the death of the lessee, and the rights to the use and occupancy of the tract or tracts may be made effective as of the date of the death of such lessee.

In the case of the death of a lessee leaving no such relative qualified to be a lessee of Hawaiian home lands, the land subject to the lease shall resume its status as unleased Hawaiian home lands and the department is authorized to lease such land to a native Hawaiian as provided in this Act.

Upon the death of a lessee who has not designated a successor and who leaves a spouse not qualified to succeed to the lease or children not qualified to succeed to the lease, or upon the death of a lessee leaving no such relative qualified to be a lessee of Hawaiian home lands, or the cancellation of a lease by the department, or the surrender of a lease by the lessee, the department shall appraise the value of all such improvements and growing crops or improvements and aquacultural stock, as the case may be, and shall pay to the nonqualified spouse or the nonqualified children as the lessee shall have designated prior to the lessee's death, or to the legal representative of the deceased lessee, or the previous lessee, as the

case may be, the value thereof, less any indebtedness to the department, or for taxes, or for any other indebtedness the payment of which has been assured by the department, from the deceased lessee or the previous lessee. Such payments shall be made out of the loan fund and shall be considered an advance therefrom reimbursable out of payments made by the successor or successors to the tract involved.

Such appraisal shall be made by three appraisers, one of which shall be named by the department, one by the previous lessee or the legal representative of the deceased lessee, as the case may be, and the third shall be selected by the two appraisers hereinbefore mentioned.

(2) After the cancellation of a lease by the department in accordance with the provisions of sections 210 and 216 of this title, or the surrender of a lease by a lessee, the department is authorized to transfer the lease or to issue a new lease to any qualified Hawaiian regardless of whether or not he is related in any way by blood or marriage to the previous lessee.

(3) Should any successor or successors to a tract be a minor or minors, the department may appoint a guardian therefor, subject to the approval of the court of proper jurisdiction. Such guardian shall be authorized to represent the successor or successors in all matters pertaining to the leasehold: provided, that said guardian shall, in so representing such successor or successors, comply with the provisions of this title and the stipulations and provisions contained in the lease, except that said guardian need not be a native Hawaiian as defined in section 201 of this title. [Am Jul. 10, 1937, c 482, 50 Stat 504; Nov. 26,

1941, c 544, §3, 55 Stat 783; Jul. 9, 1952, c 614, §4, 66 Stat 514; am L 1963, c 207, §2; am L 1981, c 90, §3; am L 1985, c 137, §1]

§209. Successors to lessees. *[Text of section as amended subject to consent of Congress.]* (a) Upon the death of the lessee, his interest in the tract or tracts and the improvements thereon, including growing crops (either on the tract or in any collective contract or program to which the lessee is a party by virtue of his interest in the tract or tracts), shall vest in the relatives of the decedent as provided in this paragraph. From the following relatives of the lessee who are (1) at least one-quarter Hawaiian, husband, wife, or children, or (2) native Hawaiian, widows or widowers of the children, grandchildren, brothers and sisters, widows or widowers of the brothers and sisters, or nieces and nephews, – the lessee shall designate the person or persons to whom he directs his interest in the tract or tracts to vest upon his death. The Hawaiian blood requirements shall not apply to the descendants of those who are not native Hawaiians but who were entitled to the leased lands under the provisions of section 3 of the Act of May 16, 1934 (48 Stat. 777, 779), as amended. In all cases such person or persons need not be twenty-one years of age. Such designation must be in writing, may be specified at the time of execution of such lease with a right in such lessee in similar manner to change such beneficiary at any time and shall be filed with the department and approved by the department in order to be effective to vest such interests in the successor or successors so named.

In case of the death of any lessee, except as hereinabove provided, who has failed to specify a successor

or successors as approved by the department, the department may select from only the following qualified relatives of the decedent:

(1) Husband or wife;

(2) If there is no husband or wife, then the children.

The rights to the use and occupancy of the tract or tracts may be made effective as of the date of the death of such lessee. In the case of the death of a lessee leaving no designated successor or successors, husband, wife, or children qualified to be a lessee of Hawaiian home lands, the land subject to the lease shall resume its status as unleased Hawaiian home lands and the department is authorized to lease such land to a native Hawaiian as provided in this Act.

Upon the death of a lessee leaving no designated successor or successors, husband, wife, or children qualified to be a lessee of Hawaiian home lands, or the cancellation of a lease by the department, or the surrender of a lease by the lessee, the department shall appraise the value of all such improvements and growing crops and shall pay to the legal representative of the deceased lessee, or to the previous lessee, as the case may be, the value thereof, less any indebtedness to the department, or for taxes, or for any other indebtedness the payment of which has been assured by the department, from the deceased lessee or the previous lessee. Such payment shall be made out of the loan fund and shall be considered an advance therefrom reimbursable out of payments made by the successor or successors to the tract involved.

Such appraisal shall be made by three appraisers, one of which shall be named by the department, one by the previous lessee or the legal representative of the deceased lessee, as the case may be, and the third shall be selected by the two appraisers hereinbefore mentioned.

(b) After the cancellation of a lease by the department in accordance with the provisions of sections 210 and 216 of this title, or the surrender of a lease by a lessee, the department is authorized to transfer the lease or to issue a new lease to any qualified Hawaiian regardless of whether or not he is related in any way by blood or marriage to the previous lessee.

(c) Should any successor or successors to a tract be a minor or minors, the department may appoint a guardian therefor, subject to the approval of the court of proper jurisdiction. Such guardian shall be authorized to represent the successor or successors in all matters pertaining to the leasehold: provided, that said guardian shall, in so representing such successor or successors, comply with the provisions of this title and the stipulations and provisions contained in the lease, except that said guardian need not be a native Hawaiian as defined in section 201 of this title. [Am Jul. 10, 1937, c 482, 50 Stat 504; Nov. 26, 1941, c 544, §3, 55 Stat 783; Jul. 9, 1952, c 614, §4, 66 Stat 514; am L 1963, c 207, §2; am L 1981, c 112, §1; am L 1982, c 272, §1]

APPENDIX N

Hawaii Revised Statutes (1985 & Supp. 1992)

ADMINISTRATIVE PROCEDURE

§91-1 Definitions. For the purpose of this chapter:

(1) "Agency" means each state or county board, commission, department, or officer authorized by law to make rules or to adjudicate contested cases, except those in the legislative or judicial branches.

(2) "Persons" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies.

(3) "Party" means each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any court or agency proceeding.

(4) "Rule" means each agency statement of general or particular applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice requirements of any agency. The term does not include regulations concerning only the internal management of an agency and not affecting private rights of or procedures available to the public, nor does the term include declaratory rulings issued pursuant to section 91-8, nor intra-agency memoranda.

(5) "Contested case" means a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.

(6) "Agency hearing" refers only to such hearing held by an agency immediately prior to a judicial review of a contested case as provided in section 91-14. [L 1961, c 103, §1; Supp, §6C-1; HRS §91-1]

§91-9 Contested cases; notice; hearing; records. (a) In any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.

(b) The notice shall include a statement of:

(1) The date, time, place, and nature of hearing;

(2) The legal authority under which the hearing is to be held;

(3) The particular sections of the statutes and rules involved;

(4) An explicit statement in plain language of the issues involved and the facts alleged by the agency in support thereof; provided that if the agency is unable to state such issues and facts in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved, and thereafter upon application a bill of particulars shall be furnished;

(5) The fact that any party may retain counsel if the party so desires and the fact that an individual may appear on the individual's own behalf, or a member of a partnership may represent the partnership, or an officer or authorized employee of a corporation or trust or association may represent the corporation, trust, or association.

(c) Opportunities shall be afforded all parties to present evidence and argument on all issues involved.

(d) Any procedure in a contested case may be modified or waived by stipulation of the parties and informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.

(e) For the purpose of agency decisions, the record shall include:

(1) All pleadings, motions, intermediate rulings;

(2) Evidence received or considered, including oral testimony, exhibits, and a statement of matters officially noticed;

(3) Offers of proof and rulings thereon;

(4) Proposed findings and exceptions;

(5) Report of the officer who presided at the hearing;

(6) Staff memoranda submitted to members of the agency in connection with their consideration of the case.

(f) It shall not be necessary to transcribe the record unless requested for purposes of rehearing or court review.

(g) No matters outside the record shall be considered by the agency in making its decision except as provided herein. [L 1961, c 103, §9; Supp, §6C-9; HRS §91-9; am L 1980, c 130, §1; am imp L 1984, c 90, §1]

[§91-9.5] Notification of hearing; service. (a) Unless otherwise provided by law, all parties shall be given written notice of hearing by registered or certified mail with return receipt requested at least fifteen days before the hearing.

(b) Unless otherwise provided by law, if service by registered or certified mail is not made because of the refusal to accept service or the board or its agents have been unable to ascertain the address of the party after reasonable and diligent inquiry, the notice of hearing may be given to the party by publication at least once in each of two successive weeks in a newspaper of general circulation. The last published notice shall appear at least fifteen days prior to the date of the hearing. [L 1976, c 100, §1]

§91-10 Rules of evidence; official notice. In contested cases:

(1) Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. The agencies shall give effect to the rules of privilege recognized by law.

(2) Documentary evidence may be received in the form of copies or excerpts, if the original is not readily available; provided that upon request parties shall be given an opportunity to compare the copy with the original.

(3) Every party shall have the right to conduct such cross-examination as may be required for a full and true disclosure of the facts, and shall have the right to submit rebuttal evidence.

(4) Agencies may take notice of judicially recognizable facts. In addition, they may take notice of generally recognized technical or scientific facts within their specialized knowledge; but parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed.

(5) Except as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence. [L 1961, c 103, §10; Supp, §6C-10; HRS §91-10; am L 1978, c 76, §1]

§91-11 Examination of evidence by agency. Whenever in a contested case the officials of the agency who are to render the final decision have not heard and examined all of the evidence, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision containing a statement of reasons and including determination of each issue of fact or law necessary to the proposed decision has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the officials who are to render the decision, who shall personally consider the whole record or such portions thereof as may be cited by the parties. [L 1961, c 103, §11; Supp, §6C-11; HRS §91-11]

§91-12 Decisions and orders. Every decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by separate findings of fact and conclusions of law. If any party to the proceeding has filed proposed findings of fact, the agency shall incorporate in its decision a ruling upon each proposed finding so presented. The agency shall notify the parties to the proceeding by delivering or mailing a certified copy of the decision and order and accompanying findings and conclusions within a reasonable time to each party or to the party's attorney of record. [L 1961, c 103, §12; Supp, §6C-12; HRS §91-12; am L 1980, c 232, §4; am imp L 1984, c 90, §1]

§91-13 Consultation by officials of agency. No official of an agency who renders a decision in a contested case shall consult any person on any issue of fact except upon notice and opportunity for all parties to participate, save to the extent required for the disposition of ex parte matters authorized by law. [L 1961, c 103, §13; Supp, §6C-13; HRS §91-13]

§91-13.1 Administrative review of denial or refusal to issue license or certificate of registration. Except as otherwise provided by law, any person aggrieved by the denial or refusal of any board or commission listed in section 26H-4 to issue a license or certificate of registration, shall submit a request for a contested case hearing pursuant to chapter 91 within sixty days of the date of the refusal or denial. Appeal to the circuit court under section 91-14, or any other applicable statute,

may only be taken from a board or commission's final order. [L 1986, c 181, §1]

§91-14 Judicial review of contested cases. (a) Any person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right of trial by jury, provided by law.

(b) Except as otherwise provided herein, proceedings for review shall be instituted in the circuit court within thirty days after the preliminary ruling or within thirty days after service of the certified copy of the final decision and order of the agency pursuant to rule of court except where a statute provides for a direct appeal to the supreme court, which appeal shall be subject to chapter 602, and in such cases the appeal shall be in like manner as an appeal from the circuit court to the supreme court, including payment of the fee prescribed by section 607-5 for filing the notice of appeal (except in cases appealed under sections 11-51 and 40-91). The court in its discretion may permit other interested persons to intervene.

(c) The proceedings for review shall not stay enforcement of the agency decisions or the confirmation of any fine as a judgment pursuant to section 92-17(g); but the reviewing court may order a stay if the following criteria have been met:

(1) There is likelihood that the subject person will prevail on the merits of an appeal from the administrative proceeding to the court;

(2) Irreparable damage to the subject person will result if a stay is not ordered;

(3) No irreparable damage to the public will result from the stay order; and

(4) Public interest will be served by the stay order.

(d) Within twenty days after the determination of the contents of the record on appeal in the manner provided by the rules of court, or within such further time as the court may allow, the agency shall transmit to the reviewing court the record of the proceeding under review. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

(e) If, before the date set for hearing, application is made to the court for leave to present additional evidence material to the issue in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings, decision, and order by reason of the additional evidence and shall file with the reviewing court, to become a part of the record, the additional evidence together with any modifications or new findings or decision.

(f) The review shall be conducted by the appropriate court without a jury and shall be confined to the

record, except that in the cases where a trial de novo, including trial by jury, is provided by law and also in cases of alleged irregularities in procedure before the agency not shown in the record, testimony thereon may be taken in court. The court shall, upon request by any party, hear oral arguments and receive written briefs.

(g) Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

(1) In violation of constitutional or statutory provisions; or

(2) In excess of the statutory authority or jurisdiction of the agency; or

(3) Made upon unlawful procedure; or

(4) Affected by other error of law; or

(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(h) Upon a trial de novo, including a trial by jury as provided by law, the court shall transmit to the agency its decision and order with instructions to comply with the order. [L 1961, c 103, §14; Supp, §6C-14; HRS §91-14; am L 1973, c 31, §5; am L 1974, c 145, §1; am L 1979, c 111, §9; am L 1980, c 130, §2; am L 1983, c 160, §1]

§91-15 Appeals. Review of any final judgment of the circuit court under this chapter shall be governed by chapter 602. [L 1961, c 103, §15; Supp, §6C-15; HRS §91-15; am L 1979, c 111, §10]